84-1278

No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WAYNE J. YAMASAKI,
DIRECTOR, HAWAII DEPARTMENT OF TRANSPORTATION,
Petitioner,

v.

STOP H-3 ASSOCIATION, a Hawaii non-profit corporation, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether those provisions of Section 4(f) of the Department of Transportation Act of 1966 and Section 18 of the Federal-Aid Highway Act of 1968 imposing certain conditions on any highway project which "requires the use of any publicly owned land from a public park" are applicable where a park was planned based on the pre-existing location of a proposed highway, where there is no physical taking of parklands, and where the effects of the highway on the park are indirect and minimal.

2. Whether the Court of Appeals applied the wrong standard of review when it refused to accord deference to an administrative determination that no feasible and prudent alternative existed to routing a highway project alongside, but not through, a public park.*

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* The state defendant below was Ryokichi Higashionna, in his capacity as Director of the State of Hawaii Department of Transportation. He has been succeeded by Wayne J. Yamasaki. The Director of the State of Hawaii Department of Transportation is the petitioner before this Court.

Plaintiffs below and respondents before this Court were Stop H-3 Association, Life of the Land, and Hui Malama Aina O'Koolau.

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WAYNE J. YAMASAKI,
DIRECTOR, HAWAII DEPARTMENT OF TRANSPORTATION,
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STOP H-3 ASSOCIATION, a Hawaii non-profit corporation, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Wayne J. Yamasaki, Director of the Hawaii Department of Transportation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

OPINIONS BELOW

The majority and dissenting opinions of the Court of appeals are reported at 740 F.2d 1442, and are reprinted in the Appendix hereto, pp. 1a-52a, infra. The opinion of the District Court for the District of

Hawaii is reported at 538 F.Supp. 149, and is reprinted in the Appendix hereto, pp. 55a to 125a, *infra*.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on August 21, 1984. A timely Suggestion of Appropriateness of Rehearing En Banc was denied on November 15, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Respondents' asserted basis of jurisdiction in the Court of Appeals was under 28 U.S.C. §§ 1291 and 1292(a)(1). The basis for jurisdiction in the District Court was 28 U.S.C. § 1338(a).

STATUTES INVOLVED

Section 4(f) of the Department of Transportation Act of 1966, as amended, 92 Stat. 824, 49 U.S.C. § 1653(f),[2] and Section 18 of the Federal-Aid Highway Act of 1968, 82 Stat. 823, 23 U.S.C. § 138 (hereinafter jointly referred to as Section 4(f)), are identical. They provide as follows:

> "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Trans-

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[1] Prior decisions of the Court of Appeals and the District Court in this lengthy litigation are reported at 533 F.2d 434 (1976), *cert. denied*, 429 U.S. 999, 97 S.Ct. 380, 50 L.Ed.2d 325 (1976), 389 F.Supp. 1102 (1974), 353 F.Supp. 14 (1972), and 349 F.Supp. 1047 (1972).

[2] Recently recodified without substantive change as 49 U.S.C. § 303.

portation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands traversed. After the effective date of the Federal Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

STATEMENT OF THE CASE

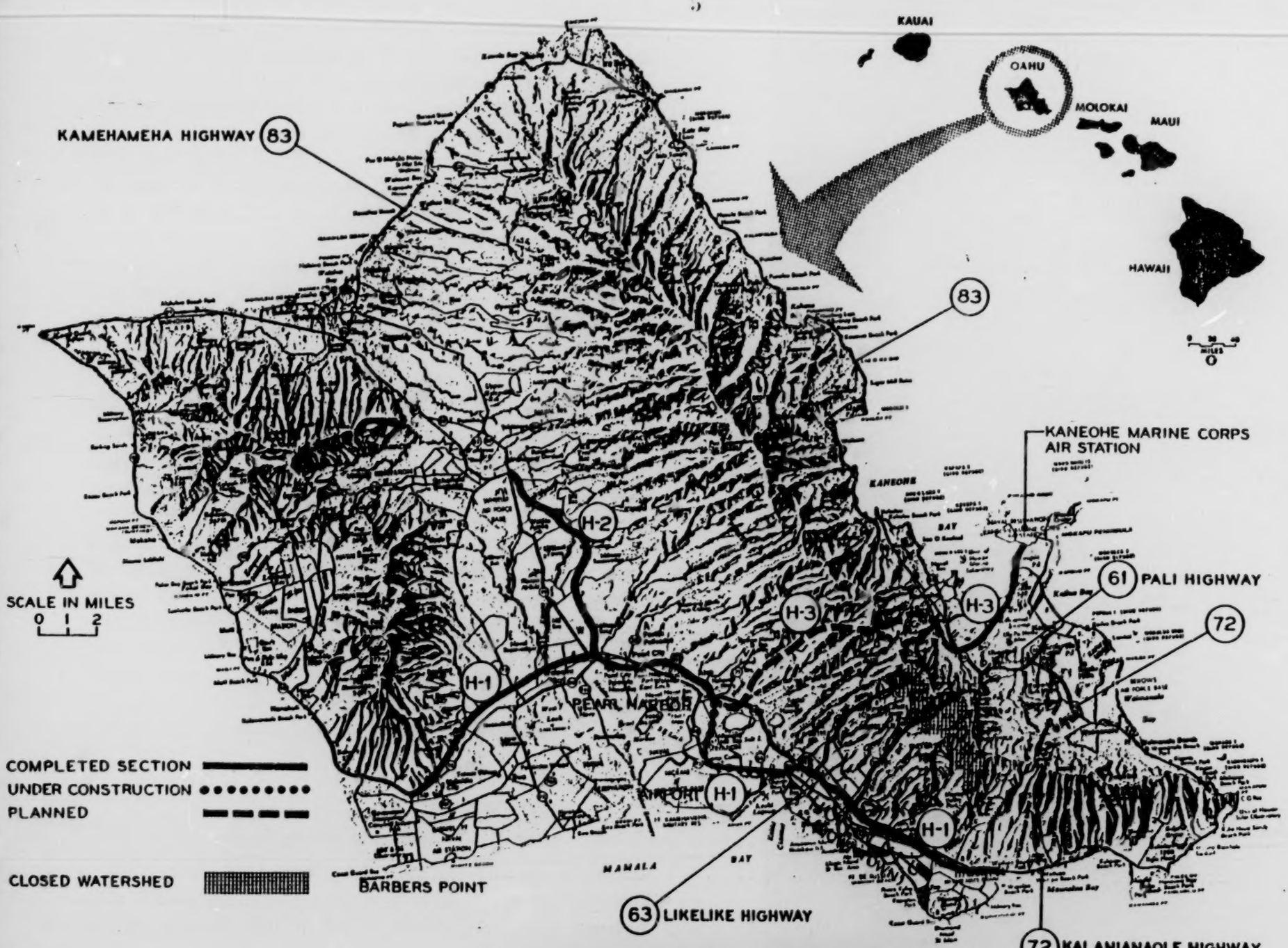
A. Introduction

The primary issue in this case is whether the Ninth Circuit Court of Appeals, by merely substituting its judgment for that of responsible administrative decision makers, may permanently enjoin the construction of a highway found to be necessary by the State of Hawaii and the United States Department of Transportation. In spite of continuous approval by responsible administrative agencies, the construction of Interstate Route H-3, connecting Kaneohe Marine Corps Air Station on the windward side of Oahu with Pearl Harbor on the leeward side, has been delayed some thirteen years by litigation. During that period the projected cost of the project has inflated threefold

from $230 million in 1972 to $742 million today. Most recently, the Ninth Circuit has enjoined further design and construction of the entire 15 mile highway because of the alleged impact of a 1.7 mile segment which skirts but does not enter a park. Even more significantly, the park which the Ninth Circuit seeks to protect by enjoining the construction of the entire highway was conceived, designed and built *after* the highway was planned, and the park planners clearly accepted the presence of H-3, even to the point of *extending* the park to the edge of the highway. A park off-ramp was even considered.

B. Hawaii's Interstate Highway System

The Hawaii Interstate Highway System, which consists of the already built H-1 and H-2, and the yet-to-be completed H-3, will provide an integrated transportation network connecting the major population areas, areas of employment and defense installations on the Island of Oahu. H-3 was designed as the first, and only, interstate/defense freeway crossing the Koolau Mountain range, and it will connect the windward Oahu cities of Kailua and Kaneohe and the Kaneohe Marine Corps Air Station with the city of Honolulu, the secondary urban center of Ewa, the nearly-completed deep-draft harbor at Barbers Point, Barbers Point Naval Air Station and Hickam Air Force Base. H-3 is necessary to serve the growing and already heavily congested civilian traffic between the leeward and windward sides of Oahu and to provide direct access between important military installations. A map showing the location of the proposed route in relation to the population centers and major military installations on Oahu appears on the facing page for this Court's reference.



HIGHWAY SYSTEM, ISLAND OF OAHU

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The completed portion of H-3, from Halekou Interchange to Kaneohe Marine Corps Air Station, is about 4 miles long. In addition, by stipulation of the parties, access ramps at Halawa Interchange from H-3 to H-1 and Moanalua Road have been constructed. The portion remaining to be completed, from Halawa Interchange to Halekou Interchange, is about 10.7 miles long. Of that 10.7 miles, a segment of approximately 1.7 miles which ends at the Halekou Interchange runs along a joint use flood control project and park called Ho'omaluhia Park. It was this small segment which caused the Ninth Circuit to halt all work on the entire highway. 740 F.2d at 1465.

H-3 was conceived and designed as part of the extension of the national highway system of Interstate and Defense Highways to Hawaii in 1960. In 1961, the concept of an H-3 crossing the Koolaus and connecting the Kaneohe Marine Air Station to the Honolulu side of Oahu was approved by the Federal government. The corridor report for H-3 was completed in 1965, and the Design Planning Report was completed in 1967. The City and County of Honolulu, which encompasses the entire island of Oahu and thus plans and controls development on the entire island, recognized a need for the highway through the Koolau Mountains from Pearl Harbor to Kaneohe Marine Corps Air Station by its Council Resolution No. 54 in 1966.

C. Ho'omaluhia Park Expanded to H-3 After the Highway Alignment Was Fixed

During the mid-1960's, the City and County of Honolulu began efforts to construct a flood control project at the present site of Ho'omaluhia Park and created

a string of parks running from Nuuanu on the Honolulu side of Oahu to Kaneohe on the island's Windward side. As early as 1967, in the H-3 Design Report, the plans for these parks and flood control project were noted, and locating H-3 so as not to interfere with these later proposed projects was made a priority. Thus, the alignment of H-3 in the Kaneohe area was established so as to allow for future construction of the flood control project as well as implementation of the City's park concept.

Coordination on the detailed design of H-3 and planning of the flood control project and park continued. As authorized by Congress in the Flood Control Act of 1970, P.L. 91-611, the flood control/park project boundaries were well removed from H-3. By this time, final designs for H-3 were being prepared, and portions of the route were under construction. Trail crossings under H-3, which is to be elevated in the vicinity of the park, were being coordinated as were hydraulic engineering designs for H-3 and the flood control project.

The flood control project/park boundaries were expanded in 1971 and then again in 1974 at the request of the City and County in order to foreclose the possibility of unwanted urban development between H-3 and the flood control/park project. This last expansion brought the park's boundaries up to H-3. In September 1976, the City and County entered into a contract with the United States Army Corps of Engineers for the construction of the flood control/park project now known as Ho'omaluhia Park. This contract was executed seven months after the United States Court of Appeals for the Ninth Circuit, con-

struing the applicability of Section 4(f) to the section of H-3 on the Honolulu side of the Koolaus, re-imposed an injunction on the construction of H-3; although the deficiency found by the Ninth Circuit was on the Honolulu side of the Koolaus, the Court enjoined all of the project, including that section of H-3 around Ho'omaluhia Park. *Stop H-3 Association* v. *Coleman,* 533 F.2d 434 (9th Cir. 1976).

The histories of H-3 and Ho'omaluhia Park clearly show that the Park expanded to meet H-3's boundaries. In fact, the designers for H-3 considered an off-ramp to the Park for improved park access, and the City actually desired to use H-3 for access to the park. Because H-3 is outside the park, no physical use would be made of the park. Most of the park's active use areas were located away from H-3, and the highway would not even be visible from the park's active use areas.

D. The Secretary of Transportation's Section 4(f) Determination

The administrative determination of the Secretary of Transportation reflected this history of coordination. The finding by the Secretary that no feasible and prudent alternative existed to routing H-3 along Ho'omaluhia Park's border was based in part on this history of coordination.

In the Ho'omaluhia Park Section 4(f) Statement, the Secretary considered five alternatives to the recommended H-3 alignment. Two involved shifting the H-3 alignment towards the mountains (Mauka) or towards the ocean (Makai). Two involved building H-3 along the recommended alignment but either on an elevated

structure or lowered below grade as the highway went around Ho'omaluhia Park. The fifth was not building H-3 at all. All alternatives were rejected as not being feasible and prudent alternatives to constructing H-3 in its recommended alignment. 740 F.2d at 1450-1458.

Rejection of the first four alternatives was compelled by certain topographical, environmental, and geographical requirements which had to be met in the design of H-3 These included avoidance of physical taking of Section 4(f) land from a public golf course; a minimum elevation of the tunnel necessary to go through the Koolau Mountains to avoid sources of artesian water; the sloping topography between the Koolau Mountains and Ho'omaluhia Park, and the existing, statutorily required geometric design requirements for Interstate freeway projects. *See,* 23 U.S.C. § 109.

Following the Secretary's determination on December 10, 1980, the State of Hawaii and Federal government moved to terminate the injunction previously imposed on the project by the Ninth Circuit. The present phase of the litigation on H-3 followed.

E. Proceedings Below

1. *District Court Decision.* Trial was held on this matter for two weeks, from October 14 to 29, 1981. Fifteen witnesses testified, and 1394 pages of transcripts were recorded. In addition to Section 4(f), at issue was Petitioner's compliance with the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.* and the Endangered Species Act of 1973, 16 U.S.C. § 1531, *et seq.* 740 F.2d at 1446.

On the question of Section 4(f) compliance, the District Court heard testimony on why the Secretary of Transportation had rejected alternatives to construction of H-3 in the recommended alignment. This expert testimony from engineers was received in the course of the introduction of exhibits and portions of the administrative record which formed the basis for the Secretary's decision. 531 F. Supp. at 179-183. As much of the evidence consisted of topographic maps, diagrams of alternative alignments and traffic patterns, and other raw data, the District Court received testimony on that evidence to illuminate the determination made by the Secretary. This testimony established that complex traffic movements, undesirable curves, confusing configuration were reasons against finding the Makai alternative prudent and feasible, and that population growth, increased trans-Koolau commuter traffic, and inadequacy of existing facilities were reasons against finding a No-build alternative to be prudent and feasible.

The District Court found compliance by Petitioner with all environmental statutes, including Section 4(f), and lifted the injunction against the project which had been in effect since the Ninth Circuit's previous 1976 decision. 538 F. Supp at 183-4. It found that four of the five Section 4(f) alternatives rejected by the Secretary as not prudent and feasible were properly rejected. However, it did require another Section 4(f) determination, more completely supported by the administrative record, that the Mauka alternative was not prudent and feasible before it would permit construction to proceed. *Id.* This determination was made and the Secretary granted the necessary location and

design approvals for construction of H-3 on November 12, 1983.

2. *Court of Appeals Decision.* The Ninth Circuit subsequently reversed the District Court by a vote of two to one, holding that the No-Build alternative had been unreasonably rejected by the Secretary. 740 F.2d at 1465-6. The Court also held unanimously that the Makai alternative had been unreasonably rejected. *Id.* Based on what petitioners believe was a restrictive, narrowly selective and incorrect view of the administrative record, the Ninth Circuit found insufficient support for the District Court's determination that Section 4(f) had been complied with. It ignored most of the administrative record as well as the testimony and evidence considered by the District Judge.

Circuit Judge Wallace dissented on the "no-build" issue, suggesting that a "no-build" alternative to going past Ho'omaluhia Park properly encompassed only the segement of H-3 in the vicinity of the park, and not the entire length of H-3. Both as a matter of law and of common sense, he correctly viewed the initial question of whether or not to build a project as separate from how to build that project. 740 F.2d at 1467-8. Analyzing Section 4(f)'s legislative history and statutes similar to Section 4(f), he wrote that "Congress took the choice of planning a highway as a given under section 138. Congress did not envision that the Section would have to reconsider that initial choice of project in protecting park lands." 740 F.2d at 1467. He further argued that while in every case, utilizing the majority's reasoning, a complete "no-build" alternative would be an alternative to be considered under Section 4(f), no other court had previ-

ously placed such restrictions on the Secretary. 740 F.2d at 1467. Such interference with the cooperative federalism embodied by federally-aided highway projects could not have been contemplated by Congress. 740 F.2d at 1768.

REASONS FOR GRANTING THE WRIT

I. The Decision by the Ninth Circuit that H-3 Uses Ho'omaluhia Park Conflicts With Decisions of Other Courts.

The joint planning of H-3 and Ho'omaluhia Park, the expansion of the park to its present common boundary with H-3, and the design of H-3 to facilitate park use are all factors similar to those which other courts have held that the Secretary could properly consider in concluding that Section 4(f) is not applicable. *A.C.O.R.N.* v. *Brinegar,* 398 F.Supp. 685, 693 (E.D. Ark. 1975), *aff'd. A.C.O.R.N.* v. *Coleman,* 531 F.2d 864 (8th Cir. 1976). *See also National Wildlife Federation* v. *Brinegar,* 529 F.2d 359, 370-71 (5th Cir. 1976).

Such factors are especially important where the legislative history of Section 4(f) does not suggest that Congress ever intended the statute to apply as restrictively as the Ninth Circuit Court of Appeals has applied it. H-3 will not physically take one square inch of parkland, and, in fact, the park expanded to meet the alignment of H-3. Reference to the legislative history on Section 4(f) shows Congressional concern only with situations where highways would physically go through and destroy existing parks. *See,* Comments by Senator Yarborough at 112 Cong. Rec. 14073-74, and 21192 (1966), and 114 Cong. Rec. 24036-37 (1968), Comments by Senator Mansfield at 114 Cong.

Rec. 24024 (1968), Comments by Senator Rogers at 114 Cong. Rec. 23707 (1968).

In addition, this Court's only prior decision construing Section 4(f), *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), does not support the Ninth Circuit's "constructive use" analysis of section 4(f). This Court described Section 4(f) as "a plain and explicit bar to the use of federal funds for construction of highways *through* parks." (Emphasis added), *Ibid.,* 401 U.S. at 417, 91 S.Ct. 821, 28 L.Ed.2d 150. At least one court has found that there is no such thing as "constructive use" under Section 4(f). *Nashvillians Against I-440* v. *Lewis,* 524 F.Supp. 962, 975 (D. Tenn. 1981). Petitioners believe this view to be consistent with *Overton Park.*

II. The Ninth Circuit Judges' Substitution of Their Own Judgment for that of the Secretary Is Unprecedented and Points Up the Need for Guidance from this Court Regarding the Limits of Review of Such Administrative Decisions.

Whether or not "constructive use" exists as an abstract concept, the facts of the interrelated development of H-3 and Ho'omaluhia Park could surely have been considered by the Secretary in finding that H-3 complied with Section 4(f).

The Ninth Circuit, in reviewing the validity of an administrative determination by the Secretary of Transportation pursuant to Section 4(f), clearly overstepped the bounds of acceptable judicial scrutiny. It accorded absolutely no deference to the Secretary's determination that no feasible and prudent alternative existed to building H-3 along Ho'omaluhia Park.

Nor, needless to say, did it accord any deference to the opinion of the United States District Court for the District of Hawaii. Instead, the Ninth Circuit ignored the bulk of the administrative record and evidence received at trial and merely substituted their judgment for that of the administrators. Although purporting to apply this Court's only prior decision involving Section 4(f), *Citizens to Preserve Overton Park* v. *Volpe, supra,* the Ninth Circuit in fact subjected a Federally-funded undertaking to the type of excessive and unfounded procedural requirements that this Court has repeatedly disavowed. *Weinberger* v. *Catholic Action of Hawaii,* 454 U.S. 139, 102 S.Ct. 197, 70 L.Ed.2d 298 (1981), *Strycker's Bay Neighborhood Council* v. *Karlen,* 444 U.S. 223, 100 S.Ct. 497, 62 L.Ed.2d 433 (1980), *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). Only two terms ago, this Court stressed the limited judicial role in assessing administrative agency compliance with environmental statutes, concluding that the role was of necessity a limited one in deference to the expertise of administrative agencies. *Baltimore Gas and Electric Co.* v. *NRDC,* —— U.S. ——, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983), *Metropolitan Edison Co.* v. *People Against Nuclear Energy,* 460 U.S. 766, 103 S.Ct. 1556, 75 L. Ed.2d 534 (1983).

The extreme position of the Ninth Circuit is emphasized by its extraordinary divergence from other Circuits on the applicability of Section 4(f). *See, Falls Road Impact Committee, Inc.* v. *Dole,* 581 F.Supp. 678, 693 (E.D. Wisc. 1984) (Court rejected argument that any impact on park could be construtive use,

and instead required a showing of substantial impacts), *aff'd.* 737 F.2d 1476 (7th Cir. 1984); *Citizens to Preserve Wilderness Park* v. *Adams,* 543 F.Supp. 21, 27-28 (D. Neb. 1981) (Court held that "Secretary need not ignore the nature of the parklands or the effects of the use of them. He must give parklands great deference but need not treat all parklands exactly alike."), *aff'd.* 1685 F.2d 438 (8th Cir. 1982); *A.C.O.R.N.* v. *Brinegar, supra,* (location of principial facilities away from highway, landscaping in area of the park, and location of park after freeway route determined are all factors in finding no constructive use).

Such an extreme result is contrary to the decisions of other Circuits, is contrary to the spirit and intent of Section 4(f), and is contrary to the intent of this Court when it decided *Citizens to Preserve Overton Park* v. *Volpe, supra.* The Ninth Circuit's decisions in this action have placed extraordinary burdens upon both the State and federal governments and have directly caused the astronomical inflation of construction costs.

The Ninth Circuit, by ignoring the Secretary's assessment of the entire administrative record, also ignored this Court's most recent pronouncement that the discretion exercised by federal decision-makers regarding particular facts must be given great weight by a court. *Baltimore Gas and Electric Co.* v. *NRDC, supra.* In fact, because review of the Secretary's decision must be judged on the entire administrative record, *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. at 419, 91 S.Ct. at 825, 28 L.Ed.2d at 155, failure by a court to consider part of an administrative record as a basis for an agency's decision is

itself ground for reversal. *Louisiana Environmental Society* v. *Dole,* 707 F.2d 116, 121-22 (5th Cir. 1983).

Full consideration of the record is required, for under Section 4(f), as all other statutes, a court may not substitute its judgment for that of an agency. *Louisiana Environmental Society* v. *Dole, supra, Township of Springfield* v. *Lewis,* 702 F.2d 426 (3rd Cir. 1983), *National Wildlife Federation* v. *Lewis,* 519 F. Supp. 523 (D.Conn. 1981), *aff'd.* 677 F.2d 259 (2nd Cir. 1982), *Coalition for Responsible Regional Development* v. *Coleman,* 555 F.2d 398 (4th Cir. 1977), *Monroe County Conservation Council* v. *Adams,* 566 F.2d 419 (2d Cir. 1977), *cert. den.* 435 U.S. 1006, 98 S.Ct. 1876, 56 L.Ed.2d 388 (1977). All that may be determined is whether the Secretary applied the proper statutory test and whether she could have reasonably believed that the facts as presented in the record met that test.

It is clear that cumulative impacts of alternatives, similar to those set out in the Ho'omaluhia Section 4(f) Statement, may justify even the physical taking of parkland. *Maryland Wildlife Foundation* v. *Lewis,* 560 F.Supp. 466 (D.Md. 1983), *aff'd sub nom Maryland Wildlife Federation* v. *Dole,* 747 F.2d 229, (1984); *Citizens to Preserve Wilderness Park* v. *Adams, supra, Philadelphia Council of Neighborhood Organizations* v. *Coleman,* 437 F.Supp. 1347 (E.D. Pa. 1977), *aff'd* 578 F.2d 1375 (3rd Cir. 1978).

The Ninth Circuit endorsed the Makai alternative which was rejected by the Secretary in part because of safety considerations. Safety was explicitly recognized as an appropriate Section 4(f) consideration in *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S.

at 416, 91 S.Ct. at 821, 28 L.Ed.2d at 151, *Maryland Wildlife Federation* v. *Lewis,* 560 F.Supp. at 474, and *Coalition for Responsible Regional Development* v. *Coleman,* 555 F.2d at 402. Yet the Court of Appeals, unlike the District Court, erroneously refused to consider explanatory testimony on this safety question. *Louisiana Environmental Society* v. *Dole,* 707 F.2d at 123

The Court of Appeals' endorsement of the "no-build" alternative was in error, for the law is clear that a proposed alternative which does not meet the basic need for a project may be rejected as imprudent. *Arizona Past and Future Foundation* v. *Lewis,* 722 F.2d 1422, 1429 (9th Cir. 1983), *Monroe County Conservation Council* v. *Adams, supra,* 566 F.2d at 424, *Coalition For Responsible Regional Development* v. *Coleman, supra,* 555 F.2d at 401. Indeed, so obvious is the validity of this basic proposition that no other court had previously ever required the Secretary to re-examine a determination that a "no-build" alternative is not a feasible and prudent alternative to a project. Other courts have correctly recognized that an alternative to a project which does nothing is in a real sense no alternative at all.

III. Misapplication of Section 4(f) Has Caused and Will Continue To Cause Unwarranted Cost and Delay for Transportation Projects Nationwide.

Section 4(f) has spawned considerable litigation. Resolution of an inter-circuit split on the scope and application of Section 4(f) alone should warrant the granting of certiorari. Certiorari would also be warranted to firmly establish the proper role of the fed-

eral judiciary in reviewing discretionary administrative decisions relating to highway construction.

It must also be stressed that some definitive guidance in the application of Section 4(f) is necessary as a practical matter. H-3 is, unfortunately, only one of many highway projects which have been unconscionably stalled and delayed in large part because of extreme interpretations of Section 4(f). Consider, for example, the section of Interstate Route I-220 near Shreveport, Louisiana, which received location approval in 1965, but which had been repeatedly enjoined by reviewing courts. *Louisiana Environmental Society* v. *Dole, supra, revg.* 513 F.Supp. 179 (W.D. La. 1981), *Louisiana Environmental Society* v. *Coleman,* 537 F.2d 79 (5th Cir. 1976) *supra, revg.* 407 F. Supp. 1309 (W.D.La. 1974); 524 F.2d 930 (5th Cir. 1975). An even more extreme example of delay is Interstate Highway I-90 in Washington, between Seattle and Bellevue. *Adler* v. *Lewis,* 675 F.2d 1085 (9th Cir. 1982), 506 F.2d 677 (9th Cir. 1974), 350 F.Supp. 262 (W.D.Wash. 1972), 455 F.2d 1111 (9th Cir. 1971).

Delay has unreasonably escalated the cost of these projects, and such delay has in large part been caused by interpretations of Section 4(f) which occasionally border on the incredible. *Louisiana Environmental Society* v. *Coleman,* 537 F.2d at 87 (Displacement of 1508 persons, 21 businesses and 2 churches held not infeasible or imprudent.) Such decisions have been so untenable as to be explicitly rejected by other courts, *Citizens to Preserve Wilderness Park* v. *Adams,* 543 F.Supp. at 28. Finally, of course, long-awaited transportation facilities needed by a traffic-weary public

have been kept from completion. A definitive ruling by this Court is needed both to resolve the split among circuits and to end the interminable delay of necessary transportation projects.

CONCLUSION

The Ninth Circuit has ignored not only the reasoned decisions of the federal and State executives, but also the clear development in Section 4(f) interpretation since *Overton Park*. The Ninth Circuit has also impermissibly substituted its notions of feasible and prudent highway alternatives for that of the Secretary of Transportation.

The questions presented by this Petition are substantial, important and recurring, and definitive ruling by this Court would, therefore, serve the public interest. For these reasons, this Court should issue a writ of certiorari and reverse the Ninth Circuit's decision.

Respectfully submitted,

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APPENDIX

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

(August 12, 1984)

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

No. 82-4357.

STOP H-3 ASSOCIATION, a Hawaii non-profit corporation, Life of The Land, a Hawaii non-profit corporation, Hui Malama Aina O Ko'Olau, *Appellants,*

v.

ELIZABETH H. DOLE, as Secretary of the United States Department of Transportation, Ralph Segawa, as Hawaii Division Engineer, Federal Highways Administration, and Ryokichi Higashionna, as Director of the Department of Transportation of the State of Hawaii, *Appellees.*

Argued and Submitted Nov. 29, 1983.

Decided Aug. 21, 1984.

Plaintiffs brought a complaint for declaratory and injunctive relief against federal and state transportation officials challenging proposed highway project. The United States District Court for the District of Hawaii, Samuel P. King., Chief Judge, 538 F.Supp. 149, entered judgment, and appeal was taken. The Court of Appeals, Ely, Circuit Judge, held that: (1) the Secretary of the Department of Transportation's approval of proposed highway project was an abuse of discretion; (2) record did not establish that the Secretary could reasonably conclude that a no build alternative had to be rejected as imprudent; (3)

Federal Highway Administration's decision to rely on United States Fish and Wildlife Service's biological opinion regarding endangered species was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (4) environmental impact statement was sufficient; and (5) supplemental environmental impact statement was not required.

Affirmed in part, reversed in part, and remanded.

Wallace, Circuit Judge, filed an opinion concurring in part.

* * * * * * * * *

Boyce R. Brown, Jr., Honolulu, Hawaii, Ronald Albu, Legal Aid Soc. of Hawaii, Kaneohe, Hawaii, for appellants.

Randall Y.K. Young, Honolulu, Hawaii, Thomas H. Pacheco, Dept. of Justice, Washington, D.C., George W. Playdon, Jr., Honolulu, Hawaii, for appellees.

Appeal from the United States District Court for the District of Hawaii.

Before ELY, WALLACE, and REINHARDT, Circuit Judges.

ELY, Circuit Judge:

We are once again faced with environmental challenges to the proposed construction by the State of Hawaii of the remaining portion of Interstate Route H-3.[1] In this skir-

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[1] The H-3 project has been the subject of extensive litigation spanning nearly 12 years. *See Stop H-3 Ass'n v. Volpe*, 349 F. Supp. 1047 (D.Hawaii 1972); *Stop H-3 Ass'n v. Volpe*, 353 F. Supp. 14 (D.Hawaii 1972); *Stop H-3 Ass'n v. Brinegar*, 389 F. Supp. 1102 (D.Hawaii 1974), *rev'd*, 533 F.2d 434 (9th Cir.), *cert. denied*, 429 U.S. 999, 97 S.Ct. 526, 50 L.Ed.2d 610 (1976); *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434 (9th Cir.), *cert. denied*, 429 U.S. 999, 97 S.Ct. 526, 50 L.Ed.2d 610 (1976); *Stop H-3 Ass'n v. Lewis*, 538 F.Supp. 149 (D.Hawaii 1982). The earlier history of the controversy is reviewed thoroughly in *Stop H-3 Ass'n v. Brinegar*,

mish, the appellants[2] challenge on numerous grounds the appellees'[3] approval of H-3, alleging violations of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1976 & Supp. V 1981) (NEPA), the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1982) (ESA), the Department of Transportation Act of 1966, 49 U.S.C. §§ 1651-1660 (1976 & Supp. V 1981) (DOTA), the Federal-Aid Highway Act of 1966, 23 U.S.C. §§ 101-157 (1982) (FAHA), and various implementing regulations. The appellants appeal the District Court's Findings of Fact and Conclusions of Law, *Stop H-3 Association v. Lewis*, 538 F.Supp. 149 (D.Hawaii 1982), which denied many of their claims for declaratory and injunctive relief and which dissolved the injunctions against construction of H-3 that had been in place since 1972. The appeal is timely, and we have jurisdiction to consider the ap-

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389 F.Supp. at 1105-07. The more recent factual background and procedural history of the controversy is set forth at 538 F.Supp. at 154-56. It should also be noted that construction on the remaining portion of H-3 was resumed in January 1983, but was enjoined by this Court pending disposition of this appeal. This Court's injunction issued November 30, 1983, and will remain in effect until the District Court issues a new injunction in conformity with our decision.

[2] The appellants are Stop H-3 Association and Life of the Land, both of which are non-profit organizations chartered for the purpose of opposing the construction of H-3, and Hui Malama Aina O Ko'olau, an unincorporated association formed "to protect the Hawaiian people, the Hawaiian lifestyle, and the land from destruction."

[3] The appellees are the Secretary of the United States Department of Transportation, the Hawaii Division Engineer for the Federal Highway Administration, and the Director of the Department of Transportation of the State of Hawaii. As this litigation has progressed, the incumbent Secretary of Transportation has been substituted for his or her predecessor as a named defendant, under the authority of Fed.R.App.P. 43(c)(1).

peal under 28 U.S.C. § 1291 (1982) and 28 U.S.C. § 1292 (a)(1) (1982). We affirm in part and reverse in part.

I. SECTION 4(f)

The principal issue in this appeal is whether the Secretary of Transportation (Secretary) has complied with section 4(f) of DOTA, 49 U.S.C. § 1653(f), and section 18 of FAHA, 23 U.S.C. § 138. (Both statutes, which essentially are identical,[4] are hereinafter referred to simply as "section 4(f).")

A. Introduction

Section 4(f) is part of Congress' response to the growing public concern over the preservation of our Nation's

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[4] Section 4(f) states:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

49 U.S.C. § 1653(f) (1976).

natural beauty. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 404, 91 S.Ct. 814, 817, 28 L.Ed.2d 136 (1971). In section 4(f), Congress has determined that the preservation of our parklands should be given major consideration in connection with all proposed highway construction programs that are to receive financial aid from the federal government. The statute provides, in declaring national policy, that "special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands . . . ." The statute further provides that:

> [T]he Secretary [of Transportation] shall not approve any project or program which requires the use of any publicly owned land from a public park . . . of national, State, or local significance . . . unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . resulting from such use.

23 U.S.C. § 138; 49 U.S.C. § 1653(f). It is obvious that the requirements of section 4(f) are stringent. Moreover, the implementing regulations promulgated by the Secretary pursuant to section 4(f) 4(f) regulations) require the Secretary to prepare and circulate a statement (4(f) statement) that must examine the highway's proposed use of parkland in light of the requirements of section 4(f). *See* 23 C.F.R. § 771.19 (1980). The 4(f) regulations specifically require the 4(f) statement to analyze alternatives to the use of the parkland to determine whether the alternatives are feasible and prudent. *See id.*

In its proposed configuration, H-3 will use land from two public parklands: (1) Ho'omaluhia Park,[5] a major

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[5] "Ho'omaluhia" in Hawaiian means "to make a place of peace and tranquility." Ho'omaluhia Park is a 450-acre mountain park; it is the major non-ocean park on the island of Oahu. The park

regional park; and (2) Pali Golf Course Park,[e] one of Oahu's most challenging and heavily used public golf courses. Because of H-3's use of the parklands, 4(f) statements were prepared in 1971 (approved by the Secretary

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includes a 32-acre lake, camping and picnicking areas, and equestrian and hiking trails. The Honolulu Department of Parks and Recreation describes the park as follows:

> Ho'omaluhia is a program park, where all activities are directed toward the exploring, evaluating and appreciating of the natural environment and our interaction with it. Recreation at Ho'omaluhia will offer many ways to become involved in the environment, through nature walks, hiking, camping, picnicking, cloud watching and other programs to enhance environmental awareness. Variety is the key, and to ensure it, the wilderness atmosphere of quiet and solitude must be maintained.

Department of Parks and Recreation of the City and County of Honolulu, Ho'ike (1981).

Ho'omaluhia Park began as a flood control project developed by the Army Corps of Engineers. Between 1966 and 1970 the concept of the park was expanded from a 35-acre "green-belt" surrounding the flood control dam and reservoir to a 75-acre facility for general recreational purposes. In 1973, the proposed park was further expanded to 115 acres, taking into consideration the planned Windward alignment of H-3. A 115-acre area between the park and the highway was to act as a "buffer zone" between the two projects. This area subsequently was purchased by the City and County of Honolulu and incorporated into the project, making part of the boundary of the park contiguous with the proposed H-3 right-of-way. A master plan for the park was adopted in February 1974. The plan restricts all of the park's intensive uses, *i.e.*, camping and picnicking, to the interior 115 acres of the park. The intensive use area is separated from the proposed path of H-3 by a peripheral park circulation road and a low density recreational use zone. Nonetheless, the largest three campsite areas begin 100, 200, and 700 feet, respectively, from the proposed path of H-3. In addition, half of the length of the equestrian trail is between 75 and 200 feet from the proposed

in 1974) for Pali Golf Course Park and in 1979 (approved by the Secretary in 1980) for Ho'omaluhia Park. In response to the District Court's order, 538 F.Supp. at 184, the Pali Golf Course Park Section 4(f) Statement was supplemented in 1983. *See* Fed. Highway Admin., U.S. Dep't of Transp., Highways Div., State of Hawaii Dep't of Transp., Final Second Supplement to the Interstate Route H-3 Environmental Impact/4(f) Statement (1982), lodged with this Court on July 7, 1983.

All of the above mentioned 4(f) statements conclude that there is no feasible and prudent alternative to the

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path of H-3. On November 21, 1978, the District Court ruled that the proximity of H-3 to the park constituted constructive use of the park. Thereafter, the appellees moved the District Court to reconsider its ruling. On April 8, 1982, the District Court affirmed its earlier ruling by again holding that H-3's impacts on Ho'omaluhia Park constituted a constructive use sufficient to bring section 4(f) into play, notwithstanding that the plan for the park and the plan for H-3 had been designed together. *See* 538 F.Supp. at 176-77. The appellees did not appeal this ruling.

[6] Pali Golf Course Park lies approximately 700 feet southwest of Ho'omaluhia Park. Nestled at the foot of the Nuuanu Pali Lookout, the 220-acre, 18-hole course is considered one of Oahu's most challenging public courses because of its rolling terrain and the general layout of its fairways and greens. The course is open year round and, being the only 18-hole public course in the Windward region, is very heavily used. The northeast side of the golf course borders on Kamehameha Highway.

[7] In its proposed configuration, H-3 will occupy almost completely the area separating Ho'omaluhia Park and Pali Golf Course Park. Moreover, the Halekou Interchange, which is proposed to connect H-3 to Kamehameha Highway, will take approximately 3.5 acres from the northwest end of Pali Golf Course Park. *See* Fed. Highway Admin., U.S. Dep't of Transp., Highways Div., State of Hawaii Dep't of Transp., Final Second Supplement to the Interstate Route H-3 Environmental Impact/4(f) Statement (1982), lodged with this Court on July 7, 1983. *See also infra* notes 7 & 9.

use of Ho'omaluhia Park or to the use of Pali Golf Course Park.[7] The Secretary concurred in that conclusion and the District Court held that the Secretary properly found there is no feasible and prudent alternative to the use of Ho'omaluhia Park.[8] *See* 538 F.Supp. at 181, 183. The District Court also held that the Secretary reasonably rejected certain of the alternatives to the use of Pali Golf Course Park.[9] The appellants challenge the Secretary's rejection

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[7] The Final Second Supplement, prepared in response to the District Court's order, is not part of the record on appeal; indeed, its adequacy has not been reviewed by any federal court. If such a review is to take place, the proper tribunal to conduct the initial review would be, of course, the District Court. We note in passing, however, that the Final Second Supplement, at 29, rejects the alternatives to the use of Pali Golf Course Park (namely, the Makai Realignment and the No Build alternative) by reference to the Ho'omaluhia Park Section 4(f) Statement. We note also in passing that the Final Second Supplement, at 27-28, concludes that the Secretary should adopt a new design for the Halekou Interchange, one which reduces the amount of golf course land taken by the interchange from 4.09 to 3.49 acres. *See also infra* note 9.

[8] While the District Court held that the Secretary's Ho'omaluhia Park Section 4(f) Determination was invalid and remanded the 4(f) satement, the basis for that decision was that "the 4(f) statement does not adequately support the finding that all possible measures have been taken to minimize harm to the park." *See* 538 F.Supp at 183. The District Court affirmed the Secretary's conclusion that no feasible and prudent alternatives exist to the use of the park. *See id.* It is that conclusion which the appellants challenge and which we must now evaluate.

[9] The District Court held that the Secretary's Pali Golf Course Park Section 4(f) Determination was invalid because "the record does not adequately support the conclusion that all possible maesures have been taken to minimize harm to the golf course." *See* 538 F.Supp. at 183. The court also stated that "the inquiry does not end with the determination that there are no feasible

of the alternatives to the use of Pali Golf Course Park and Ho'omaluhia Park as being unsupported by the record. They challenge the District Court's holdings on the same ground, as well as on the ground that the District Court's decision was made upon an erroneous application of *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). After a thorough, probing, and in-depth review of the administrative record, we agree with the appellants' contentions in respect to the "Makai Realignment" alternative and the "No Build" alternative, and, accordingly, we reverse.[10]

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alternatives to the use of the [Pali Golf Course] 4(f) property." *Id.* at 182. Yet, the District Court remanded the Pali Golf Course Park Section 4(f) Determination "for further documentation that no feasible and prudent alternatives exist to the use of the golf course lands and all possible measures to minimize harm to the golf course have been taken." *Id.* at 184. In other words, the District Court apparently held the Secretary's determination invalid because it violated one prong of the 4(f) test, yet remanded the 4(f) statement with instructions to remedy violations of *both* prongs of the 4(f) test. For the purposes of this appeal, we will assume that the District Court found that the Secretary had violated *both* prongs of the 4(f) test. We, therefore, do not have jurisdiction over the portion of the controversy that involves the challenges to the Secretary's Pali Golf Course Park Section 4(f) Determination.

[10] We base our decision today on the Secretary's rejection of the Makai Realignment and the No Build alternative *qua* alternatives to the use of Ho'omaluhia Park. For reasons discussed *supra* note 9, the issue of whether the Secretary properly rejected the above specified alternatives *qua* alternatives to the use of Pali Golf Course Park is not properly before this Court at this time. Since the Makai Realignment and No Build alternative would avoid completely the use of either Ho'omaluhia Park or Pali Golf Course Park, however, the following discussion sometimes will be framed in reference to both parklands.

B. Standard of Review

As to all of the Secretary's section 4(f) determinations at issue in this case, the standard of judicial review is whether the Secretary's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982); *Overton Park,* 401 U.S. at 416, 91 S.Ct. at 823. While the Secretary's decisions are entitled to a presumption of regularity, that presumption does not "shield his action[s] from a thorough, probing, in-depth review." *Overton Park,* 401 U.S. at 415, 91 S.Ct. at 823. The reviewing court is required to consider whether:

1. The Secretary acted within the scope of his authority (not at issue in this case).

2. The Secretary properly construed his authority to approve the use of parkland as limited to situations where none of the alternatives to such use are feasible and prudent.

3. The Secretary could have reasonably believed that in the case under review there are no feasible and prudent alternatives.

4. The Secretary's decision was based on a consideration of the relevant factors.

5. The Secretary made a clear error of judgment.

6. The Secretary's action followed the necessary procedural requirements (not at issue in this case). *Id.* at 415-17, 91 S.Ct. at 823-24. *See also Stop H-3 Association v. Coleman,* 533 F.2d 434, 445 (9th Cir.) (the court, in reviewing the Secretary's decision, "must satisfy itself that the Secretary evaluated the highway project with the mandates of section 4(f) clearly in mind"), *cert. denied,* 429 U.S. 999, 97 S.Ct. 526, 50 L.Ed.2d 610 (1976).

In its consideration of the Secretary's determination, the reviewing court must draw upon *Overton Park's* defi-

nition of a "feasible and prudent alternative":[11] parklands may be "used" for highway purposes only if "there [are] truly unusual factors present in [the] case," if "feasible alternative routes involve uniquely difficult problems," or if "the cost or community disruption resulting from alternative routes [reach] extraordinary magnitudes." 401 U.S. at 413, 416, 91 S.Ct. at 822, 823.[12]

Moreover, the reviewing court should consider the full administrative record of the agency's action, *id.* at 420, and if the record fails to show a sufficient basis for the Secretary's decision, the 4(f) determination must be overturned, *see id.* In addition, the "reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by

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[11] In *Overton Park* the Supreme Court stated that the section 4(f) requirement that an alternative be "feasible" means that the alternative must be able to be built as a matter of sound engineering: "For this exemption to apply the Secretary must find that as a matter of sound engineering it would not be feasible to build the highway along any other route." 401 U.S. at 411, 91 S.Ct. at 821 (footnote omitted). All of the alternatives considered in the Ho'omaluhia Park and Pali Golf Course Park Section 4(f) Statements are "feasible" because they all can be built as a matter of sound engineering. The only issue in dispute is whether the alternatives that would avoid use of the parklands are prudent. *See infra* note 18.

[12] The Second Circuit has aptly paraphrased the *Overton Park* test as follows:

> In other words, a road must not take parkland, unless a prudent person, concerned with the quality of the human environment, is convinced that there is no way to avoid doing so.

Monroe County Conservation Council v. Volpe, 472 F.2d 693, 700 (2d Cir. 1972) (footnote omitted).

substituting what it considers to be a more adequate or proper basis." *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947).

In reviewing the District Court's decision affirming the Secretary's action, this Court should apply the same standards of review used by the District Court. *See Southeast Alaska Conservation Council v. Watson*, 697 F.2d 1305, 1312 (9th Cir. 1983). The District Court's review is accorded no particular deference, because the District Court, limited to the administrative record, is in no better position to review the Secretary's action than is the Court of Appeals. *See Arizona Past & Future Foundation v. Lewis*, 722 F.2d 1423, 1425-26 (9th Cir.1983); *Asarco, Inc. v. Environmental Protection Agency*, 616 F.2d 1153, 1161 (9th Cir.1980). Thus, this Court may review the administrative record and determine for itself whether the Secretary's action was arbitrary, capricious, or an abuse of discretion. *Southeast Alaska Conservation Council*, 697 F.2d at 1312.

Bearing in mind the specified legal standards, we now turn to the appellants' contentions.

C. Discussion

The appellants contend: (1) that the Ho'omaluhia Park Section 4(f) Statement, the Ho'omaluhia Park Section 4(f) Determination,[13] and the rest of the administrative record

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[13] The Ho'omaluhia Park Section 4(f) Determination is a document prepared by the Secretary and included in the Ho'omaluhia Park Section 4(f) Statement. The opening paragraph of the Ho'omaluhia Park Section 4(f) Determination states:

> This statement sets forth the basis for a determination that there is no feasible and prudent alternative to the constructive use of land from Ho'omaluhia Park for a proposed Federal-aid highway designated as Interstate H-3, and that the highway proposal includes all possible planning to minimize

fail to provide a basis for the Secretary to conclude that no feasible and prudent alternative exists to H-3's use of Ho'omaluhia Park, and (2) that the District Court erred in holding that the Secretary could have reasonably reached such a conclusion. Two of the rejected alternatives, the Makai Realignment and the No Build alternative, would have no impact upon either Ho'omaluhia Park or Pali Golf Course Park. The appellants argue that these alternatives have not been shown to be imprudent. We agree.

1. *The Makai Realignment*

In the Makai Realignment, H-3 would be realigned to turn northward before reaching Ho'omaluhia Park and would follow the existing alignment of Likelike Highway and Kamehameha Highway from the Kaneoke Interchange to the Halekou Interchange. The H-3 traffic would merge with the Likelike Highway traffic, and, along Kamehameha Highway, H-3 would be on a viaduct with at-grade front-

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harm resulting from such use. This determination is made pursuant to 49 U.S.C. 1653(f) and 23 U.S.C. 138.

Ho'omaluhia Park Section 4(f) Determination, at 1.

Its concluding paragraph states:

> *Based on the above factors and considerations,* it is our determination that there is no feasible and prudent alternative to the constructive use of land from Ho'omaluhia Park and that all planning to minimize harm resulting from such use has been accomplished.

Id. at 5 (emphasis supplied).

Therefore, while the Secretary may have considered the entire administrative record in reaching his decision that no feasible and prudent alternatives exist to H-3's use of Ho'omaluhia Park, the actual basis for his decision is set forth in the Ho'omaluhia Park Section 4(f) Determination. *Cf. Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947) (reviewing court is limited to judging the justificatory grounds invoked by the agency).

age roads underneath to permit cross-corridor movement for local residents.

As above noted, this alternative would avoid all use of both Ho'omaluhia Park and Pali Golf Course Park. The Secretary nonetheless rejected this alternative because:

> [I]t would require the dislocation of one church, four businesses and 31 residences adjacent to Likelike and Kamehameha Highways; increase noise, air quality and visual impacts to residences in the general vicinity; require additional costs due to the need for the viaduct structure ($42 million additional); and require construction to lesser design geometric standards.

Ho'omaluhia Park Section 4(f) Determination, at 3.

The appellants argue that the above listed reasons do not represent the "unique problems," the "truly unusual factors," or the "cost or community disruption [reaching] extraordinary magnitudes" required by *Overton Park*. Indeed, the District Court specifically found that the displacements resulting from the Makai Realignment were not, by themselves, sufficient to justify use of the parkland. *See* 538 F.Supp. at 180. Nevertheless, the District Court found that the Secretary could reasonably have believed that the sum of the listed factors rendered the alternative imprudent. *See id.* The court based its finding on the proposition that "*Overton Park* does not bar considering whether all of the difficulties posed by an alternative route, taken together, render that alternative imprudent." *Id.*[14] The only

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[14] The appellants assert that the "totality of the circumstances" approach applied by the District Court is an erroneous application of the law in that it violates the *Overton Park* prohibition against a "wide ranging balancing of competing interests." *See Overton Park*, 401 U.S. at 411-13, 91 S.Ct. at 821-22. Since we find that the reasons advanced in the Ho'omaluhia Park Section 4(f) Determination even when amalgamated, do not satisfy the *Overton Park*

"factor" the District Court discussed was "construction to lesser geometric standards." *See id.* After a painstaking and thorough review of the record, we conclude that we cannot affirm the District Court's decision because the reasons for finding the Makai Realignment imprudent advanced by the Secretary in his 4(f) determination do not satisfy the stringent *Overton Park* standards that we must apply.

The first three reasons need not long detain us, for these are displacements that one would normally expect might happen in following *Overton Park*. The dislocation of one church, four businesses and thirty-one residences no doubt is a community disruption of some magnitude. We do not believe, however, that this disruption is of the "extraordinary" magnitude required by *Overton Park*.[15] In *Overton Park* the Supreme Court stated:

> [S]ince people do not live or work in parks, if a highway is built on parkland no one will have to leave his home or give up his business. Such factors are common to substantially all highway construction. Thus, if Congress intended these factors to be on an equal footing with preservation of parkland, there would have been no need for the statutes. . . . But the very existence of the statutes indicates that protection of parkland was to be given paramount importance.

Overton Park, 401 U.S. at 412-13, 91 S.Ct. at 821-22 (footnote omitted). We find that the Secretary could not have reasonably concluded that the community displacements

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standards, we need not reach the issue of the "totality" approach. We express no opinion as to the propriety of such an approach.

[15] The District Court apparently conceded that the community displacements resulting from the Makai Realignment are not, by themselves, sufficient to render that alternative imprudent under *Overton Park*. *See* 538 F.Supp. at 180.

resulting from the Makai Realignment rose to the level required by *Overton Park.*

Likewise, the increased cost of $42 million (1978 dollars) is not a cost of extraordinary magnitude, especially in light of the projected total cost of H-3—$386 million (1979 dollars), *see* NHV-SEIS, vol. I, at 37. This is not to say that $42 million is not a considerable sum of money; however, when the taking of parkland is involved, "cost is a subsidiary factor in all but the most exceptional cases." *Coalition for Responsible Regional Development v. Brinegar,* 518 F.2d 522, 526 (4th Cir. 1975). We hold that the Secretary could not have reasonably concluded that the increased cost of the Makai Realignment was of the "extraordinary magnitude" required by *Overton Park.*[16]

As to the third reason—increased noise, air quality and visual impacts to residences in the general vicinity—there is nothing in the record to show that this factor represents a disruption of extraordinary magnitude. *Overton Park* amply made clear that only in the most exceptional cases may parkland be taken solely to prevent highways from adversely affecting areas that are already developed. *See Overton Park,* 401 U.S. at 412-13, 91 S.Ct. at 821-22. We are not convinced that the Secretary could have reasonably concluded that this is one of those exceptional cases.

This brings us to the fourth and final reason—the only reason that we find even somewhat troubling—"lesser design geometric standards." "Lesser design geometric standards" has been translated in the context of this case to mean "safety considerations." *See* 538 F.Supp. at 180.

At the outset, we note that there appears to be a dearth of case law that specifically addresses safety issues as they

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[16] In its analysis of the prudence of the Makai Realignment the District Court made no mention of the increased cost of the alternative.

relate to the taking of 4(f) land.[17] Nonetheless, in *Overton Park* the Supreme Court emphatically stated:

> [The defendants] contend that the Secretary should weigh the detriment resulting from the destruction of parkland against the cost of other routes, *safety considerations*, and other factors, and determine on the basis of the importance that he attaches to these other factors whether, on balance, alternative feasible routes would be "prudent." . . .
>
> [N]o such wide-ranging endeavor was intended . . . . [I]f Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the [4(f)] statutes . . . . [T]he very existence of the statutes indicates that protection of parkland was to be given paramount importance.

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[17] Moreover, there is some question as to where "safety" fits into the *Overton Park* requirements; that is, is "safety" properly placed in the feasibility or the prudential requirement? Safety might well be considered a matter of "sound engineering" and, therefore, included in the feasibility requirement. *See supra* note 11. On the other hand, safety could just as well be considered a matter of prudence. But, as one commentator points out:

> 'Feasible' smacks of technical considerations, 'prudent' of the entire range of concerns relevant to wisdom. Since both words appear it is not necessary to refine 'feasible' beyond the general concept of capability of being built, or of being made to work, with available technology. [citing *Overton Park*] Nuances as to other factors which might tend to make an engineering project inadvisable, . . . need not be addressed as questions of feasibility, since they can be considered under the requirement of prudence.

Gray, *Section 4(f) of the Department of Transportation Act*, 32 Md.L.Rev. 327, 367-70 (1973). We prefer to adopt this approach, and, accordingly, we will consider safety under the requirement of prudence.

Overton Park, 401 U.S. at 411-13, 91 S.Ct. at 821-22 (footnote omitted) (emphasis supplied).

It seems obvious to us that safety considerations, since they so directly involve human life, warrant extremely close scrutiny when determining whether such considerations satisfy the *Overton Park* standards. Neither a court nor an agency should weigh lightly the potential risk to human life an alternative might pose. On the other hand, undue deference to a prior pronouncement that an alternative is undesirable because of safety considerations would transform such a pronouncement into a "talisman." For these reasons, there is a need for an especially "thorough, probing, and in-depth review" when safety issues are presented for review. In the case at hand, we have conducted just this sort of review, and we find that the record before the Secretary could not have provided a sufficient basis for him to conclude reasonably that the safety considerations of the Makai Realignment were "truly unusual factors," that they reflected "unique problems," or that they represented cost or community disruption reaching "extraordinary magnitudes."

The Ho'omaluhia Park Section 4(f) Statement, upon which the Secretary relied, *see* 538 F.Supp. at 178-79, mentions "safety considerations" a scant three times:

> CONS:
>
> . . . .
>
> (e) Traffic movements will be complex due to the high volume of H-3 traffic to be funneled into Likelike Highway and the short distance between the Kaneohe Interchange, Kaheliki Interchange, and Kamehameha Highway.
>
> (f) Undesirable curves for H-3/Likelike Highway movements. Design speeds on the through route will

> have to be reduced from 55 MPH to 30 MPH to negotiate the ramp curves safely and comfortably.
>
> . . . .
>
> (j) . . . The loop ramp configuration at Kaneohe Interchange is required, because of grade differences, and is unusual for a through highway connection. The confusing configuration, coupled with the high volume of merging and weaving traffic from H-3 plus Likelike Highway (3,300 v.p.h. on H-3 plus 3,300 v.p.h. on Likelike) is undesirable because of safety considerations.

Ho'omaluhia Park Section 4(f) Statement, at 20-21.

Two points should be noted regarding the traffic density figures cited in the Ho'omaluhia Park Section 4(f) Statement. First, the capacity of the Likelike Highway is 3650 vph (vehicles per hour) and the capacity of H-3 is projected to be 3900 vph. *See* NHV-SEIS, vol. III, app. B, at 29-30. Therefore, even at peak rush hour, the two highways will be operating at less than capacity. *See id.* at 31. Second, the 3300 vph figure was based on an outdated population projection for the Windward side of 150,000; the most recent official population projections forecast a Windward side population of between 125,700 and 138,500. *See* 538 F.Supp. at 166.

The District Court, in finding that the Secretary properly rejected the Makai Realignment as imprudent, expressly relied upon the "safety considerations" of this alternative: "In particular, the Makai Realignment would necessitate reducing design speeds on the through route from 55 MPH to 30 MPH and require an unusually complex and unsafe ramp configuration." *Id.* at 180.

A close examination of the record, however, reveals that the above mentioned speed reduction would be necessary only at one interchange, and then only to negotiate the

"exit" ramp safely—a total distance of less than one mile. *See, e.g.*, NHV-SEIS, vol. I, at fig. III-9. In other words, the ramp configuration is not per se unsafe as suggested by the District Court—the traffic on H-3 merely would have to slow down to use the "exit" ramp.[18] The conclusion that the ramp configuration or the rest of the Makai Realignment for that matter, is not per se unsafe is further supported by the fact that there is nothing in the record to indicate that the Makai Realignment in any way fails to meet the minimum criteria for safety standards set forth by the Federal Highway Administration at 23 C.F.R. § 625.3(a)(3) (1979) (Am. Ass'n of State Highway & Transp. Officials, Geometric Design Standards for the National System of Interstate and Defense Highways (1967)).

In addition, the Likelike Highway, a little over one mile from its proposed interchange with H-3, contains a curve

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[18] At trial the District Court heard testimony from an engineer who had assisted in the preparation of the Ho'omaluhia Park Section 4(f) Statement that the Makai Realignment's intersection between H-3 and the Likelike Highway presented a "very unsafe situation." He offered no explanation as to why that conclusion was not included in the final Ho'omaluhia Park Section 4(f) Statement. Moreover, the testimony was not before the Secretary when he made his decision. As the Supreme Court has stated, "In applying [the arbitrary, capricious, or an abuse of discretion] standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138. 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973) (per curiam).

The District Court also had before it a litigation affidavit from a traffic engineer for the State of Hawaii that attested that the curved exit ramp on H-3 was "unsafe." Once again, this affidavit was not before the Secretary when he made his decision. And, the Supreme Court has characterized such affidavits as "merely '*post hoc*' rationalizations, . . . which have traditionally been found to be an inadequate basis for review." *Overton Park*, 401 U.S. at 419, 91 S.Ct. at 825 (citations omitted).

of 40 mph design speed. *See* Fed.Highway Admin., U.S. Dep't of Transp., Region 9 Staff Analysis: Interstate H-3 and existing Trans-Koolau Highway Alternatives 13 (1979) [hereinafter referred to as "Region 9 Staff Analysis"]. The current analyses do not investigate adequately the extent to which this may reduce the difference in speeds between the merging traffic from H-3 and the traffic on the Likelike Highway.

Moreover, the Pali Highway contains "substandard curves" on its Windward portion. *See id.* at 11. This, when considered together with the existence of a 40 mph design speed curve on the Windward portion of the Likelike Highway, indicates to us that, in the absence of further evidence suggesting a contrary conclusion, the existence of a ramp on H-3 with a curve of 30 mph design speed does not represent an "unusual situation" or a community disruption of "extraordinary magnitude." In other words, since trans-Koolau commuters currently are faced with travelling on highways that contain curves similar to, if not worse than, the curved ramp on H-3, we do not see that the H-3 curve will extraordinarily disrupt the community or will present an unusual situation such that the taking of 4(f) parklands is warranted.

The record, then, paints the following picture. Emptying H-3's traffic onto a curved off-ramp, decreasing the speed of that traffic from 55 mph to 30 mph, and merging that traffic with the traffic on the Likelike Highway probably raises more safety concerns than the less circuitous route of H-3's recommended alignment. The Makai Realignment, like other highways commonly in use at present, probably presents a safety risk of some magnitude. The question is, however, whether this situation presents a safety risk of the magnitude required by *Overton Park*. The problem is that the record does not illustrate what magnitude of risk

this alternative in fact poses [19] and, consequently, does not support adequately the Secretary's conclusion that the alternative is imprudent because of safety considerations.[20] In other words, the record in this case does not provide a sufficient basis for the Secretary to have reasonably concluded that the safety considerations of the Makai Realignment were of such a magnitude as to overcome the paramount importance given to the protection of parkland. *See Overton Park,* 401 U.S. at 412-413, 91 S.Ct. at 821-22. Moreover, we note that the District Court did not rely on safety reasons, per se, as the basis for upholding the Secretary's rejection of the Makai Realignment. Rather, it found it necessary to cumulate safety concerns with other unrelated factors in order to do so. Thus, even accepting the District Court's view of the record, the safety concerns would be insufficient to warrant affirmance of the Secretary's findings.

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[19] There is nothing in the record to indicate that a detailed safety analysis of the Makai Realignment cannot be conducted relatively easily. In fact, the record supports a contrary conclusion. For example, the Region 9 Staff Analysis, at 14, contains an analysis of the safety considerations of each of the 16 alternatives (2(T)H-3 alternatives, 2 H-3 alternatives, and 12 No Build alternatives), couched in terms of "accidents and severity."

[20] *Brooks v. Coleman,* 518 F.2d 17 (9th Cir. 1975) (per curiam) cited by appellees, is readily distinguishable and does not alter our conclusion. In that case, we affirmed the District Court's finding that the Secretary reasonably concluded that no feasible and prudent alternative existed to the planned use of 4(f) parkland. *Id.* at 19-20. We based our decision, in part, upon safety conditions because the record reflected that the "unusual safety problems" posed by the alternative in question represented a "truly unusual factor" or a "unique problem." *Id.* By contrast, in the case at hand, the record as it stands simply does not reflect that the safety problems posed by the Makai Realignment are "unusual" or "unique."

In conclusion, we have examined against the record the four reasons advanced by the Secretary, and wet find that the specified reasons, even when amalgamated, are insufficient to support a determination that the Makai Realignment is imprudent. Therefore, because the Secretary could not have reasonably believed that no feasible and prudent alternative exists to the use of the Ho'omaluhia Park, his approval of H-3 was an abuse of discretion. *See id.* at 415-17, 91 S.Ct. at 823-24. Accordingly, we must reverse the District Court's judgment affirming the Secreatry's action and remand to the District Court for that court to remand to the Secretary for a more comprehensive 4(f) determination considering sufficiently the Makai Realignment.

We stress that we do not find, nor is it this Court's role to find, that the Makai Realignment is *in fact* a feasible and prudent alternative. We obviously do not possess the technical expertise of roadbuilders, and we should not interfere in the technical processes of building roads. At the same time, however, it remains our solemn responsibility to insure that those with technical expertise exercise it in accordance with the laws of the United States and the public welfare. *See Citizens to Preserve Overton Park v. Volpe,* 432 F.2d 1307 at 1318 (6th Cir.1970) (Celebrezze, J., dissenting). The record before us simply does not demonstrate that the stringent requirements of section 4(f), as defined in *Overton Park* and its progeny, have been satisfied. Until those requirements are satisfied, we cannot allow our Nation's sacred parklands to be taken or used.

2. *No Build Alternative*

The No Build alternative entails not constructing the portion of H-3 that runs between the Halekou Interchange and the Halawa Interchange. *See* 538 F.Supp. at 180; Ho'omaluhia Park Section 4(f) Determination, at 4.

The record discloses that the Secretary based his rejection of the No Build alternative on four reasons:[21]

1. The alternative would require that thirty-one additional buses be purchased to meet year 2000 trans-Koolau travel demand at a total purchase cost of $3.3 million (1977 dollars) and annual operating costs, defrayed by fares, of $1.19 million (1977 dollars). *See* Ho'omaluhia Park Section 4(f) Determination, at 4; Ho'omaluhia Park Section 4(f) Statement, at 24.

2. The alternative would result in traffic congestion and increased delays experienced by Windward commuters. Ho'omaluhia Park Section 4(f) Determination, at 4.

3. The alternative would result in increased safety hazards on Likelike and Pali Highways which would directly affect Kalihi Valley and Nuuanu Valley residents. *Id.*

4. The costs of providing increased bus service which will not effectively reduce the congestion on the existing highways are documented in the supplement to the Interstate H-3 EIS. *Id.*

We hold that these four reasons, when viewed against the record, do not establish that the Secretary could reasonably conclude that the No Build alternative must be rejected as imprudent.

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[21] The District Court disposed of the No Build alternative in the following manner: "[The] defendants have sufficiently established the need for the highway. Rejection of the no-build alternative was thus reasonable." 538 F.Supp. at 180.

The mere fact that a "need" for a highway has been "established" does not prove that not to build the highway would be "imprudent" under *Overton Park*. To the contrary, it must be shown that the implications of not building the highway pose an "unusual situation," are "truly unusual factors," or represent cost or community disruption reaching "extraordinary magnitudes." *See Overton Park*, 401 U.S. at 411-13, 91 S.Ct. at 821-22.

First, we can discern no basis in the record for the Secretary to conclude reasonably that the purchase and operation of thirty-one additional buses would cause "unique problems" or that the cost would be of "extraordinary magnitude." Moreover, under 23 U.S.C. § 103(e)(4) (1982), the cost could be met by transferring funds already allocated for H-3 construction to purchase and operate the buses. The record, however, lacks an adequate analysis of the effect the transferability of such funds has on the prudence of the No Build alternative. *Cf. Benton Franklin Riverfront Trailway & Bridge Committee v. Lewis*, 701 F.2d 784, 790-91 (9th Cir.1983) (section 4(f) determination that no feasible and prudent alternatives exist held invalid because there was no consideration of the "potential of federal funds").

Second, we are not wholly convinced that the record clearly demonstrates that the increased congestion or commuter delays projected for the year 2000 would be so unusual or extraordinary that the No Build alternative must be rendered imprudent. The Pali Highway currently is operating during peak hour at 3000 vph, with the Likelike operating during peak hour at 3100 vph. NHV-SEIS, vol. III, app. B, at 30. There is, therefore, a current unused peak hour capacity of 1200 vph available to meet future demand. *See id.* Indeed, the NHV-SEIS reveals that, if H-3 is not built, the projected year 2000 peak hour demand (7300 vph) can be met by the present combined capacity of the Pali Highway (3650 vph) and the Likelike Highway (3650 vph).[22] *See id.* at 29-31.

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[22] It is also worth noting that the NHV-SEIS reveals that if H-3 is not built, the average car occupancy rate for the year 2000 trans-Koolau commuter will increase from 1.7 person per car to 2.0 person per car. NHV-SEIS, vol. III, app. B, at 31. *See generally* City and County of Honolulu, 1977 General Plan 39-40 (a goal of local planning is to encourage the development and use of public transportation by "discourag[ing] the inefficient use of the automobile").

In addition, the population projections for Windward Oahu originally used for H-3 planning were revised downward in 1978 as part of the changes in the Oahu General Plan that redirected growth from Windward Oahu to the central plain of Leeward Oahu. *See* 538 F.Supp. at 166-67. These revisions were made before the Ho'omaluhia Park Section 4(f) Statement was prepared. Rather than analyze the projected congestion and commuter delays in light of the revised population projections, however, the Secretary and the FHWA chose to ignore the revised projections and to continue to use the pre-1978 figures. *See id.* Even the District Court noted that "[i]t would have been wiser . . . to have considered whether [H-3] would still be viable if [the new] population goals are met." *Id.* at 167.

The question the Secretary failed to address, then, is whether the current unused capacity of trans-Koolau highways combined with the lower growth projections for Windward Oahu will prevent year 2000 congestion and commuter delays from becoming "truly unusual factors," from becoming "most unusual situations," or from disrupting the community to an "extraordinary" degree. In our view, this is a question that must be answered before determining that the No Build alternative is imprudent.

Moreover, the Region 9 Staff Analysis states that the rush hour capacity of the Pali and Likelike Highways could be increased by fifty percent simply by banning trucks during rush hour. Region 9 Staff Analysis, at 45. This information does not appear to have been included in any analysis of current or future congestion.[23]

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[23] It should be noted, however, that one of the terms upon which the Secretary's concurrence in the H-3 EIS was conditioned was "further study of . . . peak hour prohibition of trucks on the Likelike and Pali Highways." Office of the Secretary, U.S. Dep't of Transp., Concurrence Memorandum 2 (Nov. 21, 1980); *see* 538 F.Supp. at 170. The Secretary, then, was aware of the reduction in congestion that a truck prohibition might produce. Yet, the Sec-

Finally, our review of the Region 9 Staff Analysis reveals that of the sixteen alternatives studied therein, two non-H-3 (no build) alternatives have nearly identical projected operational characteristics as H-3: (1) the same peak hour volume to capacity ratio, (2) the same projected congestion, and (3) similar projected "accidents & severity." *Id.* at 14. We note also that these two non-H-3 alternatives offer the following advantages over H-3: (1) they have environmental impact ratings that are over three times as favorable as H-3's, (2) they increase the use of mass transit,[24] and (3) they cost only one-thirtieth of the cost of H-3. *Id.* There is no analysis in the record as to why these two alternatives should be rejected—or why they are any less prudent than H-3 in terms of congestion. In conclusion, we are not convinced that the No Build alternative must be rejected as imprudent because of traffic congestion and increased commuter delays.

Third, except for the following excerpt, the "increased safety hazards" are not substantiated or discussed in the record: "[The increased traffic on the Likelike and Pali Highways] is resulting in increased congestion and safety hazards on Likelike and Pali Highways which will have a direct effect on the residents of the valleys through which these two facilities traverse." Ho'omaluhia Park Section 4(f) Statement, at 24. This bald statement does not seem to us to provide sufficient support for the Secretary's con-

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retary apparently did not include this pertinent information in his analysis of the No Build alternative, preferring, instead, to make his decision without the benefit of "further study of . . . peak hour prohibition of trucks on the Likelike and Pali Highways." It is our view that the truck prohibition should have been studied *before* the Secretary rejected the No Build alternative as imprudent.

[24] One of the goals of the Oahu General Plan is to encourage the development and use of public transportation on the island of Oahu. *See* City and County of Honolulu, 1977 General Plan 39-40.

clusion that the No Build alternative is imprudent because of safety considerations. On the other hand, the Region 9 Staff Analysis indicates that all of the various permutations of the No Build alternative pose more safety hazards than H-3 poses. The problem is that the Region 9 Staff Analysis does not specifically mention the Nuuanu and Kalihi Valleys in this respect; in addition, for the majority of the No Build permutations, the increase in safety hazards is slight—up one rating from "minor" to "moderate" "accidents & severity." Region 9 Staff Analysis, at 14. And, if the revised population figures are used, projected congestion will likely be decreased with a concomitant decrease in projected safety hazards. We are not convinced that the present record sufficiently supports a conclusion that the No Build alternative is imprudent because of the "increased safety hazards to residents of the Nuuanu and Kalihi Valleys."

Fourth, we are uncertain as to the significance, if any, of the Secretary's fourth "reason"—that "[t]he costs of providing increased bus service which will not effectively reduce the congestion on the existing highways have been documented in the supplement of the Interstate H-3 EIS." The costs of the increased bus service indeed are documented in the supplemental EIS. As above discussed, however, the relatively modest cost of the increased bus service does not provide a sufficient basis for the Secretary to conclude that the No Build alternative is imprudent. As to the failure to reduce congestion, we note that at least four of the rejected No Build alternative's permutations (including the alternative of banning trucks at peak rush hour) are projected to have identical levels of congestion as that of H-3. *Id.* The inference is that if the No Build alternative should be held imprudent because of its failure to reduce congestion, so should H-3 for the same reason.[25]

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[25] The proposition that H-3 will not, in and of itself, greatly reduce congestion is borne out by other portions of the record.

Moreover, the inference from the record is that year 2000 traffic demand can be met by increased bus service alone. *See* Ho'omaluhia Park Section 4(f) Statement, at 23-24; NHV-SEIS, vol. I, at 272. And, again, if the lower revised population figures and the banning of trucks are considered, the effectiveness of increased bus service in reducing congestion likely would be enhanced.

In conclusion, then, it is our view that the present record does not support a determination that the No Build alternative must be rejected as imprudent. We emphasize that, as with the Makai Realignment, we do not hold that the No Build alternative is, in fact, reasonable and prudent. We merely hold that the record before us does not demonstrate that the stringent requirements of section 4(f) have been satisfied. Therefore, we reverse the District Court's judgment affirming the Secretary's action and remand to the District Court for that court to remand to the Secretary for a more comprehensive 4(f) determination considering sufficiently both the Makai Realignment and the No Build alternative.

II. THE ENDANGERED SPECIES ACT

A. Factual Background and Procedural History

The appellants also challenge the appellees' compliance with the ESA.

The Region 9 Staff Analysis indicates that only 27% of the daily trans-Koolau trips are Ewa- or Central Oahu-bound—the remainder are Honolulu- (70%) and Hawaii Kai- (3%) bound. Region 9 Staff Analysis, at 10. H-3 purportedly is being constructed primarily to service the Ewa-Windward community corridor. It is obvious that, if H-3 is built, virtually no Honolulu- or Hawaii Kai-bound trans-Koolau commuter will travel on H-3 to Aiea (where H-3 terminates) and then fight the Pearl City-Aiea traffic back to Honolulu. In other words, H-3 does not seem to have the potential to reduce greatly the congestion on the Likelike and Pali Highways.

On March 9, 1978, the Federal Highway Administration (FHWA), pursuant to the ESA, initiated formal consultation with the United States Fish and Wildlife Service (USFWS) with regard to the potential impact of the H-3 project on the Oahu Creeper.[26] The Oahu Creeper is an extremely rare species of bird; is was officially listed as endangered on October 13, 1970. *See* 50 C.F.R. § 17.11 (1980). As part of the consultation process, FWHA authorized several avifaunal surveys to produce current information on the Creeper. The surveys were conducted by Dr. Robert Shallenberger and confirmed the presence of Creepers in the North Halawa Valley.

Based on these surveys, USFWS issued its biological opinion, dated September 11, 1978. The opinion discusses Dr. Shallenberger's surveys and concludes with the following statement:

> In essence, we have very little data for providing an opinion, but feel it would be unreasonable to request [an additional] study which would be unlikely to provide definitive results. We must, therefore, assume the Oahu Creeper would be like most species in that a highway would not split a population.
>
> Based on the available information, which we grant is weak, it is our opinion the proposed project is not likely to jeopardize the continued existence of the Oahu Creeper.

Also, in a biological opinion on the *Achatinella*, dated October 7, 1981, USFWS states that FHWA need not reinitiate consultation on the Creeper.

In district court, the appellants challenged the adequacy of the biological opinion and charged that FHWA must

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[26] The consultation process under the ESA is governed by 50 C.F.R. § 402.2 (1980). The appellants have not alleged that the appellees violated the procedural requirements of this regulation.

reinitiate consultation with USFWS. In its Order Denying Plaintiffs' Motion for Partial Summary Judgment as to the Twenty-Sixth Cause of Action, the District Court ruled that the facts showed: (1) USFWS could reasonably conclude that the H-3 project is not likely to jeopardize the continued existence of the Creeper, and (2) based on 50 C.F.R. § 402.04 (1980),[27] no further consultation was required. In addition, the District Court limited the scope of review at trial to the issue of: "Whether or not the USFWS has requested that [appellees] reinitiate formal consultation regarding the Oahu Creeper . . . ."

At trial Dr. Shallenberger testified to the presence of the Oahu Creeper in North Halawa Valley, to the significance of the valley to the survival of the species, and that the H-3 freeway "is likely" to jeopardize the Creeper's continued existence. The appellants attempted to use Dr. Shallenberger's testimony to show that FHWA's decision to grant location and design approval for H-3 was arbitrary and capricious in light of H-3's potential impact on the Creeper. The appellees moved to strike the testimony of Dr. Shallenberger on the ground that USFWS had informed the appellees that further consultation on the Creeper was not required. The court granted the motion and, ultimately, ruled that FHWA had complied with the ESA.

The appellants allege that it was improper for the District Court to strike Dr. Shallenberger's testimony, since it precluded inquiry into FHWA's substantive decision to grant location and design approval for H-3. They argue that, by limiting the scope of review to the *procedural* issue of consultation with USFWS, the District Court

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[27] Under 50 C.F.R. § 402.04(e) (1980), once the USFWS issues its biological opinion, no further consultation by FHWA is required, unless the USFWS requests that FHWA reinitiate further consultation under *id.* § 402.04(f) or unless the requirements of *id.* § 402.04(h) are satisfied.

failed to examine FHWA's decision under the proper legal standard. Thus, the appellants urge this Court to conclude that FHWA's grant of location and design approval was arbitrary, capricious, an abuse of discretion, and not in accordance with the Endangered Species Act on the ground that FHWA failed to make a rational determination, based on the best available scientific data, that H-3 is or is not likely to jeopardize the existence of the Creeper.

The appellees respond that the District Court properly struck Dr. Shallenberger's testimony because the testimony did not offer any information that had not already been considered by the USFWS before issuing the biological opinion. The appellees argue that the administrative record, on its face, provides adequate support for the conclusions reached in the biological opinion, and, therefore, there was no reason to go beyond the administrative record to consider Dr. Shallenberger's testimony. Finally, the appellees contend that they have complied with the requirements of the ESA, that they properly deferred to the USFWS's biological opinion, and that, therefore, their decision to grant location and design approval for H-3 was not arbitrary and capricious.

B. Standard of Review

Under the ESA, FHWA has a duty to "insure" that its action "is not likely to jeopardize"[28] the continued existence of the Creeper. *See* 16 U.S.C. § 1536(a)(2) (1982). To this end, FHWA is required to consult with an expert agency (here, the USFWS). *See* 50 C.F.R. § 402.01 (1980). Using the "best scientific and commercial data available,"

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[28] A project will "jeopardize" an endangered species if it "reasonably would be expected to reduce the reproduction, numbers, or distribution of a listed species to such an extent as to appreciably reduce the likelihood of the survival and recovery of that species in the wild." 50 C.F.R. § 402.02 (1980).

the expert agency is required to issue a biological opinion to FHWA. *See* 16 U.S.C. § 1536(a)(2).

Here, since FHWA has complied with the consultation requirements, the question is whether FHWA's decision to rely on USFW's biological opinion in granting location and design approval for H-3 was valid. FHWA's decision is subject to review under the "arbitrary and capricious" standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982). *See Village of False Pass v. Clark,* 733 F.2d 605, 609-10 (9th Cir.1984). Thus, the issue for review is whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *See Overton Park,* 401 U.S. at 416, 91 S.Ct. at 823.

C. Discussion

In the case at hand, the District Court did not review FHWA's decision under the "arbitrary and capricious" standard. Rather, the District Court limited its review to the substantive issue of the adequacy of USFWS's biological opinion and the procedural issue of consultation with USFWS; the court did not examine FHWA's decision to rely on the biological opinion. The court limited its review in this manner apparently because the appellants' complaint, in respect to this cause of action, was couched in language that challenged USFWS's substantive compliance with the ESA and language that challenged FHWA's procedural compliance with the ESA. Appellants made clear at trial, however, that the gravamen of the cause of action was a challenge to FHWA's substantive compliance with the ESA—a challenge that the District Court should have evaluated under the "arbitrary and capricious" standard. Thus, it appears the District Court erred by not applying the proper legal standard.

Remand is not required on this issue, however, because we are able to determine from the record that as a matter of law FHWA's decision to rely on USFWS's biological opinion was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See Southeast Alaska Conservation Council,* 697 F.2d at 1312 ("[T]he appellate court may review the administrative record and determine for itself whether the [agency's action] was arbitrary, capricious, or an abuse of discretion."); *cf. Asarco, Inc. v. Environmental Protection Agency,* 616 F.2d at 1161 ("District court review of agency action is generally accorded no particular deference, because the district court, limited to the administrative record, is in no better position to review the agency than the Court of Appeals."). It is clear that FHWA complied with all initial consultation obligations and relied on an opinion issued by an expert agency. On its face, this does not seem to be a "clear error of judgment." Furthermore, while the information used to form the opinion admittedly was weak, the expert agency determined on two separate occasions that no further inquiry was necessary.

The appellants are correct when they ague that FHWA cannot abrogate its responsibility to decide whether it has taken all possible action to insure that H-3 is not likely to jeopardize the continued existence of the Creeper. *See National Wildlife Federation v. Coleman,* 529 F.2d 359, 371 (5th Cir.), *cert. denied,* 429 U.S. 979, 97 S.Ct. 489, 50 L.Ed.2d 587 (1976). But, no improper abrogation of responsibility occurred here. Dr. Shallenberger's testimony may challenge the conclusions contained in the biological opinion, but that testimony offered no information that had not already been evaluated by the expert agency. *Cf.* 50 C.F.R. § 402.04(h)(1) (1980) (reinitiation of consultation required when new information comes to light). In these circumstances, it was not unreasonable for FHWA to rely on the expert agency's opinion in deciding not to make a separate opinion regarding the Creeper. Thus,

FHWA's ultimate conclusion that, based on the best available scientific data, H-3 is not likely to jeopardize the existence of the Creeper clearly was grounded on "a consideration of the relevant factors" and, not being unreasonable as a matter of law, was not a "clear error of judgment." We hold, therefore, that the appellees have complied with the mandate of the ESA.

III. NATIONAL ENVIRONMENTAL POLICY ACT AND FEDERAL-AID HIGHWAY ACT

The appellants also contend that the appellees have not complied sufficiently with NEPA or, in addition to the alleged noncompliance with section 4(f), with FAHA. We are not persuaded by the appellants' arguments in respect to this contention and will only briefly discuss the pertinent issues.

A. NEPA-EIS Adequacy

The appellants challenge the adequacy of the Environmental Impact Statement (EIS) on three grounds: (1) that the EIS inadequately assess the secondary (socio-economic) effects of H-3, (2) that the EIS inadequately analyzes whether H-3 is consistent with local land use plans, and (3) that the EIS must be supplemented to include discussions of significant new information. The EIS for the North Halawa Valley alignment of H-3 consists of the 1972 EIS, 1973 EIS Preface, and the NHV-SEIS.

1. *Standard of Review*

In our Circuit, a district court's finding that an EIS is adequate will be reversed only if based upon an erroneous legal standard or upon clearly erroneous findings of fact. *Save Lake Washington v. Frank,* 641 F.2d 1330,

1334 (9th Cir. 1981). The district court's review of an EIS also is limited:

> Judicial review of an EIS covers only the issue of whether NEPA's procedural requirements have been met, and whether the EIS performs its primary function of presenting the decision-maker with an environmentally-informed choice. The correct standard is provided in the Administrative Procedure Act, 5 U.S.C. § 706(2)(D), which directs courts to set aside an agency action if taken 'without observance of procedure required by law . . . .'

Id. (citations omitted). Under this standard, the court employs a "rule of reason" that inquires: (1) whether the EIS contains "a reasonably thorough discussion of the significant aspects of the probable environmental consequences," *Village of False Pass v. Clark,* 733 F.2d at 613; *Trout Unlimited, Inc. v. Morton,* 509 F.2d 1276, 1283 (9th Cir.1974); and (2) whether the EIS's "form, content and preparation foster both informed decision-making and informed public participation," *Village of False Pass v. Clark,* 733 F.2d at 613; *California v. Block,* 690 F.2d 753, 761 (9th Cir.1982). Once satisfied that the agency has taken this procedural and substantive "hard look" at environmental consequences in the EIS, *see Kleppe v. Sierra Club,* 427 U.S. 390, 410 n. 21, 96 S.Ct. 2718, 2730 n. 21, 49 L.Ed. 2d 576 (1976); *Village of False Pass v Clark,* 733 F.2d at 613, the court's review is at an end.

The role of the reviewing court under NEPA, then, differs fundamentally from the role of the reviewing court under section 4(f). While the mandate of section 4(f) essentially is prohibitory, the mandate of NEPA is essentially procedural. The court's review, therefore, is much more limited under NEPA than under section 4(f). In the case at hand, the reviewing court should consider *only* whether, under the Council on Environmental Quality reg-

ulations implementing NEPA, the H-3 EIS satisfies the above specified "hard look" standard.

2. *Socio-Economic Impacts*

The Council on Environmental Quality (CEQ) established under 42 U.S.C. § 4342 (1976), promulgates uniform, mandatory regulations for implementing the procedural provisions of NEPA. *See Andrus v. Sierra Club,* 442 U.S. 347, 357, 99 S.Ct. 2335, 2340, 60 L.Ed.2d 943 (1979); *Village of False Pass v. Clark,* 733 F.2d at 613; 40 C.F.R. § 1515.2 (1982). Under CEQ regulation 40 C.F.R. § 1500.8(a)(3)(ii) (1978), an EIS must assess and discuss the secondary (socio-economic) effects of the project in question.[29] In the case at hand, the District Court found that the EIS adequately discusses the socio-economic impacts of H-3. 538 F.Supp. at 166. Based on our review of the relevant case law and the record, we cannot conclude that the District Court's finding was "clearly erroneous."

The appellants allege that the EIS fails to assess adequately the secondary effects of H-3 on population growth, public services, and community cohesion and stability of Windward Oahu. The appellants essentially are arguing that the EIS discussion of secondary impacts lacks sufficient detail and meaningful supporting data. To support this argument, the appellants cite two cases, *City of Davis v. Coleman,* 521 F.2d 661 (9th Cir.1975), and *Coalition for Canyon Preservation v. Bowers,* 632 F.2d 774 (9th Cir. 1980), in which EIS's were found inadequate. In both cases, however, the EIS's were not nearly as detailed as the EIS in the case at hand. Here, while there are some "general" discussions and "assumptions" in the EIS, and while it may have been preferable to consider the sec-

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[29] The regulations that implement FAHA impose a similar requirement. *See* 23 C.F.R. § 771.18(i) (1978).

ondary impacts in more detail, it is our view that the EIS contains reasonably sufficient data for decisionmakers to take the requisite "hard look" at the environmental consequences of H-3 and to reach subsequently an environmentally-informed and independent conclusion about H-3.

First, an "H-3 Socio-Economic Study" was prepared and circulated in 1973. The 1973 study briefly discusses the socio-economic impacts of H-3 on Windward Oahu. The appellants charge that the 1973 study is obsolete in light of the new Oahu General Plan.

Second, even if portions of the 1973 study are obsolete, the NHV-SEIS, prepared *after* the new Oahu General Plan went into effect, adequately updates the 1973 study. The NHV-SEIS contains a reasonably thorough discussion of H-3's secondary impacts in light of the planning charges that have occurred. *See* NHV-SEIS, vol. I, at 118-29.

Third, the NHV-SEIS, in a reasonably thorough fashion, discusses socio-economic phenomena in Windward region-wide terms, as well as island-wide terms. *See, e.g., id.* at xv-xviv, 45-55, 100-13, 118-29, 316-17.

Fourth, the NHV-SEIS relies upon, among other things, the conclusions and data developed by the City and County of Honolulu in connection with the updating of the Oahu General Plan in 1977. *See id.* at 13-17, 49 (table III-3), 100-13.

On the other hand, the District Court found that the appellees put forth contradictory assertions in respect to the ability of the General Plan to control H-3 induced growth. *See* 538 F.Supp. at 166. The appellants are correct when they point out that this may reflect a less than complete evaluation of H-3's secondary impacts. Nonetheless, NEPA only requires a "reasonably thorough discussion" that "fosters informed decisionmaking," not a "complete evaluation." Therefore, it is our view that the

District Court was not "clearly erroneous" in finding that the EIS assesses and discusses adequately H-3's socio-economic impacts.

3. *Consistency with Local Planning*

The regulations of both the Department of Transportation (DOT) and CEQ require the EIS to analyze the relationship of H-3 to local land use plans and to discuss how H-3 "may conform or conflict with the objectives and specific terms" of land use plans, policies, and controls for the area. *See* 23 C.F.R. § 771.18(h) (1978); 40 C.F.R. § 1500.8(a)(2) (1978). If a conflict or inconsistency exists, the EIS "should describe the extent of reconciliation and the reason for proceeding notwithstanding the absence of full reconciliation." 23 C.F.R. § 771.18(h) (1978); 40 C.F.R. § 1500.8(a)(2) (1978).

On January 18, 1977, the City and County of Honolulu adopted a revised Oahu General Plan, which became law on February 2, 1977. *See* NHV-SEIS, vol. I, at 100. The obsolete Oahu General Plan had envisioned large-scale development and population growth, including a deep draft harbor, for Windward Oahu. The new 1977 Oahu General Plan altered significantly the planning objectives for Windward Oahu. *See* 538 F.Supp. at 165. The new Plan envisions limited growth for the region and calls for a reduction in the proportion of Oahu's population living in the region. *Id.* The appellants strongly urge that: (1) H-3 is inconsistent with the population objectives and policies of the 1977 Plan,[30] (2) the inconsistencies are not resolved in the EIS, and, therefore, (3) the EIS is inadequate.

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[30] The appellants contend that H-3 is inconsistent with the 1977 Oahu General Plan because H-3 could stimulate rapid population growth contrary to the new planning goals of limited growth for Windward Oahu. As above noted, a goal of the 1977 Plan is to create employment opportunities and to direct residential population to the Ewa (Leeward) side. The appellants argue that H-3 is

Indeed, the portion of the EIS that we find most troubling is its analysis of the 1977 General Plan. For example, the appellees, in both their H-3 Travel Demand Analysis and Region 9 Staff Analysis, use outdated Windward region population projections, apparently assuming that the 1977 General Plan population goals will not be met. *See* 538 F.Supp. at 166-67. As the District Court points out, "this assumption contradicts [the appellees'] assertion that growth will be limited by the General Plan." *Id.* This would seem to indicate that the appellees may not have reasonably concluded that H-3 is consistent with the 1977 Plan. Moreover, in the NHV-SEIS the appellees assert several times that H-3 was planned only in response to the projected and desired growth pattern in Windward Oahu that appears in the 1977 General Plan. *See, e.g.,* NHV-SEIS, vol. I, at 87, 90, 103. The H-3 freeway, however, was under development when the obsolete 1964 General Plan was in effect, *see, e.g.,* 1973 EIS Preface, at 5-1 to 5-12, app. B, at 69, and at that time the appellees asserted that H-3 was consistent with the then current planning and growth policies, *see id.* app. B, at 211-292. It seems incongruous to us, therefore, that the appellees assert that H-3 is only a response to the 1977 General Plan when H-3 originally was designed to help implement the 1964 General Plan vision of an urbanized, industrial Windward Oahu.

Nonetheless, our role is not that of a "super-planner," *see* 538 F.Supp. at 164, and, under NEPA, we are not allowed to substitute our judgment for that of the agency concerning the wisdom of a proposed action. *See California v. Block,* 690 F.2d at 761. Our role is limited to insuring that the appellees have taken a "hard look" at

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inconsistent with this goal because H-3 would encourage persons employed in the EWA and Aiea-Pearl City areas to live on Windward Oahu and commute to work on Leeward Oahu. Thus, they allege that H-3 virtually will insure that the population and distribution targets of the 1977 Plan will not be met.

H-3's environmental consequences. The NHV-SEIS contains a fairly detailed discussion of H-3's relationship to state and city land use plans, policies, controls, goals, and objectives. *See* NHV-SEIS, vol. I, at 85-114, 126-29. Furthermore, the relationship between H-3 and the 1977 Plan specifically is discussed. *Id.* at 100-10. And, one of the terms upon which the appellee-Secretary's concurrence in the EIS was conditioned was:

> That the Hawaii Department of Transportation will cooperate with the City and County of Honolulu in monitoring land use and development trends on Windward Oahu, including the impact of H-3 on such trends. Hawaii DOT will cooperate with the City and County in the implementation of measures proposed to achieve General Plan objectives for Windward Oahu.

Office of the Secretary, U.S. Dep't of Transp., Concurrence Memorandum 3 (Nov. 21, 1980). *See also* Fed. Highway Admin., Decision Memorandum 4 (Dec. 5, 1980) ("the conditions required by the Office of the Secretary . . . are accepted and will be implemented by FHWA and the Hawaii DOT").

Thus, while it may have been preferable to include a comparison study of the interrelationship between H-3, the 1964 Plan, and the 1977 Plan, we cannot conclude in these circumstances that the District Court's decision was "clearly erroneous" when it found that the EIS contains adequate information for the relevant decisionmakers to reach a reasoned conclusion concerning H-3's conformity with land use planning on Oahu.

4. *Supplementation of the EIS*

a. *Standard of Review*

A federal agency has a continuing duty to gather and evaluate new information relevant to the environmental

impact of its actions, even after release of an EIS. *Warm Springs Dam Task Force v. Gribble,* 621 F.2d 1017, 1023-24 (9th Cir. 1980) (*Warm Springs Dam II*). The CEQ regulations require that agencies "prepare supplements to either draft or final environmental impact statements if . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii) (1980).

An agency's decision not to supplement an EIS will be upheld if it was reasonable. *Warm Springs Dam II,* 621 F.2d at 1024. When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require implementation of formal NEPA filing requirements. *Id.* Reasonableness depends on the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency considered the information and evaluated its impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data. *Id.*

The appellants allege that the 1977 General Plan, revised population projections, and 1980 census data are "significant new information" requiring EIS supplementation.

b. *1977 New General Plan*

The appellants assert that the "complete reversal" of Windward planning goals, as embodied by the 1977 Plan, is a "significant new circumstance" requiring further supplementation of the 1973 EIS. They argue that the shift of planned population centers from Windward Oahu to Ewa should be specifically addressed in a supplement to the EIS.

This argument has little merit. The 1977 General Plan is not "new information" that has come to light *after* release of the EIS. The relationship between H-3 and the 1977 General Plan objectives and policies is addressed in some detail in the NHV-SEIS, a supplement to the 1973 EIS. *See* NHV-SEIS, vol. I, at 100-10. We have already concluded that the EIS adequately considers the 1977 Plan; the appellees' decision not to supplement further the EIS was reasonable. *See Warm Springs Dam II,* 621 F.2d at 1024.

c. *Revised Population Projections*

As above noted, in 1978 the State of Hawaii Department of Planning and Economic Development (DPED) revised its year 2000 population projections downward; DPED reduced the Oahu population projection from 1,039,000 persons to 917,400 for the year 2000. Applying the 1977 General Plan distribution percentages to this new figure yields a target Windward Oahu population of between 125,700 and 138,500. *See* 538 F.Supp. at 166.

The NHV-SEIS fails to discuss in detail the 1978 projections, even though they were issued nearly two years before the NHV-SEIS was approved. *See id.* The appellees, however, did consider the 1978 projections in their Region 9 Staff Analysis. *See* Region 9 Staff Analysis, at app. B. They apparently concluded that older projections, predicting a Windward Oahu population of 150,500, were more valid. *See* NHV-SEIS, vol. I, at xviii; 538 F.Supp. at 167.

The District Court found, under 40 C.F.R. § 1500.8 (a)(1) (1978),[31] that the appellees met their NEPA oblig-

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[31] 40 C.F.R. § 1500.8(a)(1) (1978) states in relevant part:

> Agencies should also take care to identify, as appropriate, population and growth characteristics of the affected area and any population and growth assumptions used to justify the project or program or to determine secondary population

ations by identifying the population and growth assumptions used to justify H-3. *See* 538 F.Supp. at 166-67.

The appellants argue that the 18,000-person reduction in population figures is "significant new information" because federal decisionmakers regarded population projections and goals important when they approved the EIS. *See, e.g.*, Office of the Secretary, U.S. Dep't of Transp., Concurrence Memorandum 2 (Nov. 21, 1980) ("Since construction of H-3 is likely to stimulate development on Windward Oahu, and could contribute to pressures for development in excess of that contemplated in the General Plan, monitoring of population growth and of traffic levels on H-3 will be needed to assure that development objectives of the plan are not exceeded."). The appellants also allege that the NHV-SEIS fails to state any reason why a discussion of the reduction in projected growth was omitted from the EIS.

The appellees correctly respond that both the "outdated" and 1978 projected population figures are actually a range of projections and that the NHV-SEIS discusses the changing population projections and their ranges. *See* NHV-SEIS, vol. I, at xvii-xviii. Moreover, the EIS explains, albeit briefly, the appellees' reasons for selecting the population projections used in the EIS. *See id.* at xviii.

On this record, the appellants simply have not shown that the appellees have violated the *Warm Springs Dam II* standards; accordingly, we will not disturb the appellees' decision not to supplement further the EIS on account of the revised population projections.

d. *1980 Census Data*

The appellants argue that the 1980 census data is "significant new information" because it shows that Windward

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and growth impacts resulting from the proposed action and its alternatives. . . .

Oahu is growing faster than called for in the 1977 General Plan, and that, therefore, the growth-inducing impact of H-3 virtually will insure that General Plan growth limits will not be met. With regard to supplementing the EIS, this argument has little merit for several reasons.

First, the appellants have not persuasively shown the significance of the 1980 census data in terms of new environmental impact. *Cf. Citizens Committee Against Interstate Route 675 v. Lewis*, 542 F.Supp. 496, 554-56 (S.D.Ohio 1982) (census data does not require supplementation of EIS).

Second, the appellants' argument assumes, without showing, that H-3 will induce growth beyond that envisioned in the General Plan.

Third, as above noted, the Secretary's concurrence in the EIS was conditioned upon the Hawaii Department of Transportation's cooperation with the City and County of Honolulu "in their implementation of measures proposed to achieve General Plan objectives for Windward Oahu." *See* Office of the Secretary, U.S. Dep't of Transp., Concurrence Memorandum 3 (Nov. 21, 1980). *See also* Fed. Highway Admin., Decision Memorandum 4 (Dec. 5, 1980) (FHWA's and Hawaii DOT's acceptance of Secretary's conditions).

For these reasons, the appellees acted reasonably in not supplementing the EIS on account of the 1980 census data.

B. FAHA—Adequacy of Location/Design Reports

Under FAHA, a request for location or design approval must be accompanied by reports and other documents that discuss, *inter alia,* the anticipated economic, social, and environmental effects of the proposed action and alternatives under consideration. 23 C.F.R. §§ 790.9(c), 790.8(b)(2)(i) (1978). The H-3 Location/Design Study Report, NHV-

SEIS, 1973 EIS Preface, and 1972 EIS were submitted as evidence of compliance with this requirement. The appellants challenge the adequacy of these reports with respect to socio-economic impacts.

The appellants allege that: (1) the FAHA requirements cannot be satisfied by incorporating the EIS documents by reference; and (2) even if incorporation by reference is acceptable, the EIS is inadequate and needs to be supplemented by a detailed, current socio-economic study. The first contention has no merit. The CEQ regulations clearly permit the type of incorporation by reference to which appellants object. *See* 23 C.F.R. § 790.8(b)(2)(iv) (1978). As to the second contention, we have already concluded that the documents adequately discuss the secondary impacts of H-3.

IV. CONCLUSION

The District Court's rulings in respect to the ESA, NEPA, and the portions of FAHA other than section 4(f) are affirmed. The District Court's Order dissolving the injunctions against construction of H-3, however, is reversed. On remand, the District Court must enjoin construction of the entire highway as proposed until such time that the Secretary can demonstrate his full compliance with section 4(f) as the statute applies to Ho'omaluhia Park and has made a determination in harmony with the statutory requirements.[32] Our decision does not affect any injunctions

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[32] Pending the disposition of this appeal, an injunction has proscribed the continued work and expense in connection with the highway in question. Upon remand, the District Court will be in a better position, considering the prospect of possibly needless expenditures of the taxpayers' funds, to determine the nature and extent of the injunction that is necessary to protect the interests of all parties to the litigation pending further developments. If any of the litigants wish to suggest to this Court the question of whether an additional injunction is now necessary, and the form

the District Court has not dissolved that originated in the district court.

The judgment of this Court shall issue forthwith, and no Petition for Rehearing will be entertained. *See* Fed.R. App.P. 2.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WALLACE, Circuit Judge, concurring in part:

I concur in the portions of the majority opinion that discuss the Makai Realignment, the Endangered Species Act of 1973, and the National Environmental Policy Act of 1969 (NEPA) together with the Federal-Aid Highway Act of 1968 (FAHA). I cannot concur, however, in the majority's unnecessary analysis of the No Build alternative in connection with Ho'omaluhia Park.

The majority interprets "no build" to mean not building any of Interstate Route H-3 not already completed. The portion of H-3 that affects Ho'omaluhia Park, however, runs only between the Kaneohe and Halekou interchanges. Common sense suggests that the No Build alternative concerned with Ho'omaluhia Park covers this short segment, not all of H-3. *See, e.g., Citizens' Committee for Environmental Protection v. United States Coast Guard,* 456 F.Supp. 101, 119-20 (D.N.J. 1978). The Stop H-3 Association (the Association) advanced this argument as an alternative position in the district court. The Secretary of Transportation (the Secretary), accepting the Association's suggestion, established to the district court's satisfaction that this No Build alternative essentially duplicated the Makai Realignment. *See Stop H-3 Association v. Lewis,* 538 F.Supp. 149, 180 (D.Hawaii 1982). Properly analyzed, questions about the No Build alternative should therefore

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of any such injunction, if necessary, they may deem themselves at liberty to do so.

fall completely within our discussion of the Makai Realignment. The majority's discussion beyond that point, although termed a holding, is actually dictum based on similarly unnecessary portions of the district court's opinion and the section 4(f) statement prepared for Ho'omaluhia Park that posited and rejected a No Build alternative covering all of H-3. *See, e.g., id.* Nevertheless, I conclude that by focusing solely on this definition of a No Build alternative, the majority errs both in law and in not adopting a common sense approach to the issue.

For every proposed project, a first great question is whether or not to undertake it. The second, equally important question after deciding to undertake a project is which way to construct it. Under FAHA,

> the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park . . . unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . .

23 U.S.C. § 138 (section 138); *accord* 49 U.S.C. § 303 (section 303) (recodifying and amending section 4(f) of the Department of Transportation Act of 1966 (DOTA), 49 U.S.C. § 1653(f) (1976), repealed by Pub.L.No. 97-449, § 7(b), 96 Stat. 2444). As the plain language indicates, this statute chiefly prescribes which way to build the project. The legislative histories of section 138 and the 4(f) predecessor to section 303 shed little additional light on the meaning of this language. *See, e.g.*, S.Rep. No. 1410, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.Code Cong. & Ad. News 2800, 2837-38, 2840, 2844 (section 138); Conf. Rep. No. 2236, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.Code Cong. & Ad. News 3448, 3450 (section 4(f)). Thus, as the Supreme Court observed in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412 n. 29, 91 S.Ct. 814,

821 n. 29, 28 L.Ed.2d 136 (1971) (*Overton Park*), "we must look primarily to the statutes themselves to find the legislative intent." On their faces, sections 138 and 303 do not bar any particular project. Instead, they require the Secretary to adjust projects to avoid the use of park land. If building a project and avoiding the use of park land prove irreconcilable aims, the statutes allow the project to go forward. This scheme clearly regulates the way to build a project rather than whether to undertake it.

But what is a project? Under 23 U.S.C. § 101(a), " 'project' means an undertaking to construct a particular portion of a highway . . . ." Under 23 U.S.C. § 105(a), a program consists of "proposed projects for the utilization of the funds apportioned." Consistent with these terms, "a 'program for projects' usually presents for approval one or more stages or part [sic] of the work necessary ultimately to be completed to result in the actual finished construction of a highway." *Movement Against Destruction v. Volpe,* 361 F.Supp. 1360, 1380 (D.Md.1973) (per curiam) (two judge court), *aff'd,* 500 F.2d 29 (4th Cir. 1974). FAHA thus focuses on approval of alternative plans for highways. Other statutes of environmental protection have a much broader scope. NEPA, for example, clearly allows consideration of alternatives to highways besides other highways. *See, e.g.,* 42 U.S.C. § 4332(2)(A), (C). For purposes of FAHA, however, only highways, not other modes of transportation, represent alternatives. *Cf., e.g.,* Airport and Airway Development Act of 1970, § 12(b), Pub.L. No. 91-258, tit. I, § 12(b), 84 Stat. 221, *repealed by* Pub.L. No. 97-248, tit. V, § 523(a), 96 Stat. 695 (explicitly requiring consideration of alternate forms of transportation); *see also* 49 U.S.C. § 2201(b) (statement of purpose for "various modes of transportation" in airport planning); *but see* 49 U.S.C. § 2208(b)(5) (equivalent of sections 138 and 303). Although I recognize statements to the contrary exist, *e.g., D.C. Federation of Civic Associations*

v. Volpe, 459 F.2d 1231, 1239 (D.C.Cir.1971), *cert. denied*, 405 U.S. 1030, 92 S.Ct. 1290, 31 L.Ed.2d 489 (1972), the language, intent, and scope of FAHA lead me to conclude that Congress took the choice of planning a highway as a given under section 138. Congress did not envision that the Secretary would have to reconsider that initial choice of project in protecting park lands.

Section 303 covers any "*transportation* program or project," 49 U.S.C. § 303(c) (emphasis added), not just highway building, but accepting the initial choice of project as a given still seems appropriate. *See, e.g., Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 700 (2d Cir.1972). In *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774 (9th Cir.1980) (*Bowers*), we faced a situation similar to the construction of H-3: the proposed construction of a four-lane highway in upper Montana. Examining the adequacy of a section 4(f) review of the project, we remanded because the alternative of an improved two-lane road had not received consideration. *Id.* at 784-85. We did not suggest the Secretary consider a complete No Build alternative, although, as in every case, that choice was available. *Cf. id.* at 785 n. 5 (No Build was not one of the five alternatives considered in the 4(f) statement); *see also Louisiana Environmental Society, Inc. v. Coleman*, 537 F.2d 79, 85 (5th Cir.1976) (rejecting out of hand a No Build alternative to an entire bridge project). As *Bowers* shows, we have not previously given project-wide No Build alternatives the status the majority would.

The decision in *Maryland Wildlife Federation v. Lewis*, 560 F.Supp. 466 (D.Md.1983), provides yet another argument why project-wide No Build alternatives have no place in analyses under sections 138 and 303. There, the district court found a complete No Build alternative to a freeway in western Maryland imprudent because it would not satisfy the general purposes of the Appalachian Regional Development Act, 40 U.S.C. app. § 2. 560 F.Supp. at 473-74.

The No Build alternative to H-3 proposed by the majority would run afoul of similarly general purposes in FAHA. *See, e.g.*, 23 U.S.C. § 101(b). In both cases, however, the statutory purposes are so general that they add no more than an extra measure of federal legitimacy to a project decision already made. This indicates that project-wide No Build propositions do not actually provide "prudent alternatives" for purposes of sections 138 and 303. The choice whether to undertake a project stands as a condition precedent to application of these sections. Other laws such as NEPA guide that first choice and include consideration of complete No Build alternatives. Section 138 and 303 simply regulate the way the government may implement a chosen project.

As a final example, in *Overton Park* the Supreme Court analyzed a proposed interstate route by implicitly accepting that the choice to build a highway lay beyond any review made under sections 4(f) and 138. As proof, consider that any project-wide No Build alternative is, by definition, "feasible" under sections 303(c)(1) and 138. The Supreme Court, however, limited the question of feasible alternatives to alternative highway routes. "For this exemption to apply, the Secretary must find that as a matter of sound engineering it would not be feasible to build the highway along any other route." 401 U.S. at 411, 91 S.Ct. at 821. Nowhere in the opinion does the Court even imply that a complete No Build option, or some substitute mode of transportation, would ever represent a feasible or prudent alternative for purposes of sections 4(f) and 138 after the choice of a highway as the project.

Large highway projects assisted by federal funding are plain examples of cooperative federalism. *Cf., e.g., Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 289, 101 S.Ct. 2352, 2366, 69 L.Ed.2d 1 (1981) (Surface Mining Control and Reclamation Act of 1977). The majority, by proposing the complete rejection of an

H-3 highway as an alternative to the use of Ho'omaluhia Park by one portion of the proposed route, stands the supposition of an initial project choice in sections 138 and 303 on its head. This improperly interferes with the cooperative system regulated by these statutes. The district court also erred, in my judgment, by confusing the purposes of sections 138 and 303 with the initial decision to build a highway, *see* 538 F.Supp. at 180. A proper reading of those sections, however, shows Congress intended them to regulate which way a government constructed a project, not whether a government constructed a project at all. For this reason, I do not concur in the majority's unnecessary discussion of their No Build alternative.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 72-3606

STOP H-3 ASSOCIATION, a Hawaii non-profit corporation; LIFE OF THE LAND, a Hawaii non-profit corporation,
Plaintiffs,

vs.

ANDREW L. LEWIS, as Secretary of the United States Department of Transportation; RALPH SEGAWA, as Hawaii Division Engineer, Federal Highways Administration; and RYOKICHI HIGASHIONNA, as Director of the Department of Transportation of the State of Hawaii,
Defendants.

Civil No. 73-3794

HUI MALAMA AINA O KO'OLAU,
Plaintiff,

vs.

ANDREW L. LEWIS, as Secretary of the United States Department of Transportation; RALPH SEGAWA, as Hawaii Division Engineer, Federal Highways Administration; and RYOKICHI HIGASHIONNA, as Director of the Department of Transportation of the State of Hawaii,
Defendants.

[Filed in the United States District Court District of Hawaii Apr 20 1982 at 4 o'clock and 25 min. P.M. Walter A. Y. Chinn, Clerk]

JUDGMENT

Judgment in the above-entitled matter is hereby entered as follows:

1. Defendants' Motion to Reconsider is Denied.

2. The injunctions originally entered in Civil No. 72-03606 on July 19, 1972, and October 15, 1972, are hereby dissolved.

3. The Secretary of Transportation's grant of location and design approval dated February 5, 1981, for the H-3 project is hereby set aside.

4. Defendants' failure to prepare and circulate a supplemental EIS which reflects the project's Ho'omaluhia Park 4(f) involvement, the information contained in the H-3/Omega Collocation Studies, and the FHWA Region 9 Staff Analysis is a violation of NEPA, 40 C.F.R. §1502.9 (c)(4) (1980), and 23 C.F.R. § 771.15 (1980).

5. The Secretary of Transportation's Ho'omaluhia Park 4(f) determination is hereby set aside.

6. The Pail Golf Course 4(f) determination is hereby remanded to the Secretary of Transportation for further documentation that no feasible and prudent alternatives exist to the use of the golf course lands and all possible measures to minimize harm to the golf course have been taken.

DATED: Honolulu, Hawaii, April 20, 1982.

/s/ . . . signature illegible
United States District Judge

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII (April 2, 1982)

STOP H-3 ASSOCIATION, a Hawaii non-profit corporation; Life of the Land, a Hawaii non-profit corporation, *Plaintiffs,*

v.

ANDREW L. LEWIS, as Secretary of the United States Department of Transportation; Ralph Segawa, as Hawaii Division Engineer, Federal Highways Administration; and Ryokichi Higashionna, as Director of the Department of Transportation of the State of Hawaii, *Defendants.*

HUI MALAMA AINA O KO'OLAU, *Plaintiff,*

v.

ANDREW L. LEWIS, as Secretary of the United States Department of Transportation; Ralph Segawa, as Hawaii Division Engineer, Federal Highways Administration; and Ryokichi Higashionna, as Director of the Department of Transportation of the State of Hawaii, *Defendants.*

Civ. Nos. 72-3606, 73-3794.

United States District Court,
D. Hawaii.

April 8, 1982.

Plaintiffs brought complaint for declaratory and injunctive relief against federal and state transportation officials challenging a proposed highway project. The District Court, Samuel P. King, Chief Judge, held that: (1) preparation of the supplemental environmental impact statement

was not improperly delegated to private consultants; (2) the EIS for the project sufficiently addressed project's socioeconomic impacts in relationship to the city and county general plans; (3) a further supplemental EIS was required in order to reflect "new and significant information" regarding impact of a U. S. Coast Guard transmitting station, a staff analysis of different alternatives, and highways' impact on a park; (4) decision by Secretary of Transportation to pursue a "build" alternative was not arbitrary and capricious; (5) combined location and design hearings for the highway were properly held; (6) defendant did not violate the Endangered Species Act nor the Hawaii Endangered Species Act; (7) the statement regarding highway's impact on the park did not adequately support the finding that all possible measures were taken to minimize harm to the park; and (8) the determination regarding highway's impact on a golf course was invalid since the record did not adequately support the conclusion that all possible measures were taken to minimize harm to the golf course.

Ordered accordingly.

* * * * * * * * *

Boyce R. Brown, Jr., Honolulu, Hawaii, for plaintiffs Stop H-3 Association, et al.

Ronald Albu, Cynthia Thielen, Legal Aid Society of Hawaii, Honolulu, Hawaii, for Hui Malama Aina O Ko'Olau.

Elliot Enoki, Asst. U. S. Atty., Wallace W. Weatherwax, U. S. Atty., Honolulu, Hawaii, for Andrew L. Lewis and Ralph Segawa, Federal defendants.

Keith Y. Tanaka, Warren H. Higa, Sp. Counsel, Tobias C. Tolzmann, Honolulu, Hawaii, for Ryokichi Higashionna, Director, DOT, State of Hawaii.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

SAMUEL P. KING, Chief Judge.

I. PROCEDURAL HISTORY

This is the latest chapter in the continuing saga of (T)H-3, a proposed Interstate Defense Highway which would connect the Kaneohe Marine Corps Air Station ("KMCAS") to the Pearl Harbor Naval Base and Hickam Air Force Base.[1]

Originally, the project was to extend from Halawa to Kaneohe, passing through Moanalua Valley, the Koolau mountains, and Haiku Valley. As more fully discussed below, the highway segment extending from Halawa to the Koolaus has since been realigned through North Halawa Valley.

The project has been the subject of extensive litigation. Plaintiff Stop H-3 Association filed the original complaint in Civil No. 72-3606 on July 19, 1972.[2] By injunctions entered by Stipulation and Order dated September 15, 1972 and by Decision and Order dated October 18, 1972, *Stop H-3 Ass'n v. Volpe,* 349 F.Supp. 1047 (D.Haw.1972), this court enjoined construction and design work for the por-

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[1] For a more complete histroy of the project, see this court's decision in *Stop H-3 Ass'n v. Coleman,* 389 F.Supp. 1102 (D.Haw. 1974). Three alternative project configurations were considered for the North Halawa Valley. TH-3 contained six lanes, four for mixed traffic and two for transit. H-3 (the adopted alternative) contained four lanes for mixed traffic. T-3 would have been a two lane facility reserved exclusively for transit use.

[2] As this litigation has progressed, the incumbent Secretary of Transportation has been substituted for his predecessor as a named defendant.

tion of the freeway connecting the Halawa and Halekou interchanges until defendants could demonstrate compliance with the National Environmental Protection Act of 1969, 42 U.S.C. § 4321 *et seq.* ("NEPA"). Two years of hearings, Environmental Impact Statement (EIS) preparation, and other legal and administrative proceedings followed.

On December 26, 1974, this court held that the defendants had complied with the applicable environmental and transportation statutes and regulations, and lifted the injunctions. *Stop H-3 Ass'n v. Brinegar*, 389 F.Supp. 1102 (D. Haw.1974). A key ruling was that since "local officials" had declared that Moanalua Valley was not historically significant, even though the U. S. Secretary of the Interior had determined that it was "likely to be eligible" for inclusion in the National Register of Historic Places, the protections of section 4(f) of the Department of Transportation Act of 1966, as amended, 49 U.S.C. § 1653(f) (1970) and section 18 of the Federal Aid Highway Act of 1968, 23 U.S.C. § 138 (1970), did not apply. These statutes, hereinafter referred to as "section 4(f)," are essentially identical.[3]

On appeal, the U. S. Court of Appeals for the Ninth Circuit reversed, holding that Moanalua Valley and Pohaku ka Luahini (petroglyph rock) were entitled to the protec-

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[3] In relevant part, these statutes state:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands. . . . [T]he Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park [or] recreation area, . . . of State, or local significance . . . unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park [or] recreation area. . . .

tions of section 4(f), and reinstating the injunctions until the Secretary of Transportation (the "Secretary") could demonstrate compliance therewith. *Stop H-3 Ass'n v. Coleman,* 533 F.2d 434 (9th Cir. 1976) *cert. denied,* 429 U.S. 999, 97 S.Ct. 526, 50 L.Ed.2d 610 (1976). The court declined to rule on the other three issues which had been raised on appeal, instructing the district court to reconsider them and the Secretary's 4(f) determination in the event that the Secretary did conclude that there are no "feasible and prudent" alternatives to the routing of the project through Moanalua Valley.[4] 533 F.2d at 446.

Defendants filed a Section 4(f) Statement for Moanalua Valley with the U. S. Dept. of Transportation ("DOT") in October 1976. In January 1977, the Secretary concluded that since feasible and prudent alternatives existed to the use of Moanalua Valley, he could not approve the project.

After the Secretary's decision, defendants began to prepare a supplemental EIS examining in detail the environmental effects of aligning the project through North Halawa Valley.

On August 26, 1977, defendants moved to terminate this lawsuit, arguing that since the project would no longer go through Moanalua Valley, the injunctions reimposed by the Ninth Circuit no longer applied. This court held that any freeway segment connecting the Halawa and Halekou interchanges was subject to the injunctions and denied the motion on November 17, 1977.

The Draft North Halawa Valley Supplemental EIS (Draft "NHV-SEIS") was first circulated on November 11, 1977 and public hearings were conducted on December 12, 13, 14 and 15, 1977.

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[4] The court need not consider these claims except to the extent that the plaintiffs have reasserted them in their latest Amended Complaint.

On May 5, 1978, Plaintiff Stop H-3 Association filed its 68 pages, twelve count, Supplemented Compilation of Complaint for Injunctive and Declaratory Relief, as Amended and Supplemented. The ninth cause of action alleged noncompliance with section 4(f) with respect to the Ho'omaluhia Recreation Project (later designated Ho'omaluhia Park). Defendants moved to dismiss this cause of action, or in the alternative, for partial summary judgment, on July 11, 1978. On November 21, 1978, this court ruled that constructive use of the recreation project triggered the protections of section 4(f), and denied the motion. Defendants subsequently prepared and circulated a 4(f) statement for Ho'omaluhia Park.

The final NHV-SEIS and Ho'omaluhia Park 4(f) Statement were processed together, and approved by the Federal Highway Administration ("FHWA") on December 10, 1980. Location and design approval for the project was given on February 5, 1981.

On April 10, 1981, the parties stipulated to the filing of plaintiffs' present 142 page, 48 count, Amended and Supplemented Complaint for Declaratory and Injunctive Relief. Defendants answered this complaint on April 20, 1981. On June 6, 1981, defendants again moved to terminate the injunctions. This motion was denied on July 7, 1981.

On September 1, 1981, the parties filed a Stipulation and Order Regarding a Plan and Schedule for Identifying Issues for Dismissal, In Limine Ruling, Summary Judgment or Trial on the Merits ("Stipulation"), pursuant to which the plaintiffs voluntarily dismissed their sixth, seventh, ninth and twelfth causes of action.[5]

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[5] These causes of action were:

6. NEPA—Failure to comply with NEPA requirement of consultation before EIS prepared in final form.

7. NEPA—Failure to comply with DOT Regs re: public availability of EIS 30 days before hearing.

On September 9, 1981, plaintiffs moved for leave to amend their eighth cause of action and to add a forty-ninth cause of action. The court granted their motion as to the eighth cause of action on September 16, 1981 and as to the forty-ninth cause of action on October 14, 1981. During trial, the court permitted plaintiffs to amend their twenty-seventh and forty-ninth causes of action to conform to the evidence.

Prior to trial, the court granted defendants' unopposed motion for summary judgment as to the fourth, fifth, nineteenth and twenty-first causes of action. The court also granted defendants' motions for summary judgment as to the eighth (as amended) and thirteenth causes of action.[6]

On October 23, 1981, the court granted defendants' motion to dismiss the twenty-second and forty-seventh causes of action.[7]

On September 30, 1981, the court granted plaintiff Hui Malama Aina O Ko'olau's ("Hui Malama's") Motion for Summary Judgment as to the twenty-fifth cause of action,

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9. NEPA—Failure to comply with CEQ Regs re: list of preparers in EIS.
12. NEPA—Failure to comply with 23 C.F.R. § 771.14—who participates and who signs off.

[6] The fourth, fifth, nineteenth and twenty-first causes of action involved the defendants' alleged failure to consult with the Army Corps of Engineers and the City & County of Honolulu Board of Water Supply. The eighth cause of action alleged that the decision to approve the EIS was made before the end of the comment period. The thirteenth cause of action asserted that defendants discouraged comments and failed to distribute the EIS for comments.

[7] These causes of action alleged that the decision to approve the EIS and Ho'omaluhia 4(f) statement were based upon political considerations. Plaintiffs introduced no evidence as to these matters at trial.

and ordered defendants to initiate formal biological consultation with the U.S. Fish and Wildlife Service ("USFWS") regarding the *Achatinella* [Hawaiian Tree Snail], in accordance with section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2), and its associated regulations, 50 C.F.R. § 402.04 (1980). Defendants complied with this order on October 2, 1981. On October 29, 1981, the USFWS issued a formal biological opinion stating that constructing H-3 through North Halawa Valley would not endanger the *Achatinella.*

II. CURRENT POSTURE

Trial on Defendants' Motion to Terminate the Injunctions and Plaintiffs' Complaint for Injunctive and Declaratory Relief took place from October 14 to October 29, 1981. During closing arguments, Defendants moved for reconsideration of this court's determination that section 4(f) applied to Ho'omaluhia Park.

On November 4, 1981, Plaintiffs moved for summary judgment as to the thirty-fourth cause of action. Since the parties introduced evidence with respect to this cause of action and argued the issue at trial, summary judgment is inappropriate. Accordingly, the issue will be considered together with the other causes of action.

This court must now consider the adequacy and validity of: (1) the 1972 Moanalua Valley EIS ("1972 EIS") and 1973 Supplemental EIS ("1973 Preface") as of their approval date; (2) the NHV-SEIS; (3) the Pali Golf Course 4(f) determination; and (4) the Ho'omaluhia Park 4(f) determination.[8]

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[8] The 1972 EIS, 1973 Preface and NHV-SEIS together constitute the "EIS" for the North Halawa Valley alignment of the project.

III. ISSUES

The remaining thirty-eight causes of action fall into ten broad categories, as follows (with their associated issues):*

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* Briefly summarized, the remaining causes of action are:

1. NEPA—Reliance on Outmoded/Stale Studies.
2. NEPA—Failure to Supplemenut EIS to Reflect Change from 6 lanes to 4 lanes & Likelike Busway.
3. NEPA—Failure to circulate EIS to and obtain and defer to Board of Water Supply comments.
10. NEPA—Failure to comply with CEQ Regs. and NEPA wrongful delegation of EIS preparation.
11. NEPA—Failure to comply with 23 C.F.R. § 771.7. Non-disclosure of conflict of interest.
14. NEPA—Failure to comply with 23 C.F.R. § 771.15 and 40 C.F.R. Parts 1500-1508 re: need for Supplemental EIS addressing change from 6 to 4 lanes. Likelike busway and passenger transfer facilities.
15. NEPA—Failure to comply with CEQ Regs. Need for highway based on false assumption that highway needed to meet growth.
16. NEPA—Failure to comply with CEQ Regs & NEPA—EIS contains inadequate examination of secondary impacts.
17. NEPA—Failure to comply with CEQ Regs & NEPA—OMEGA Station.
18. NEPA—Failure to comply with CEQ Regs & NEPA—EIS is a justification, not an examination.
20. NEPA—Failure to comply with CEQ Regs. Failure to recirculate Draft after acquiring significant new information.
23. NEPA—Decision approving project was arbitrary and capricious.
24. OMB Circular A-95.
26. Endangered Species Act—Oahu Creeper.
27. Endangered Species Act—*Cyrtandra.*
28. Endangered Species—I'iwi (Part 195D, Haw.Rev.Stat.)
29. Public Hearings—Selection of North Halawa Valley before hearings.
30. Public Hearings—Combined Hearings wrong.

A. NHV-SEIS Preparation.

1. Whether defendants improperly delegated preparation of the NHV-SEIS to private consultants (Counts Ten and Eleven).

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31. Public Hearings—Design Hearing held before corridor approved.
32. Public Hearings & Approval — Design approval given without proper design hearing.
33. Study Report—Required reports not submitted. No report on social disruption.
34. Public Hearings & Approval—Evidence of NEPA and 4(f) compliance not submitted with approval request.
35. General Plan—H-3 in conflict with General Plan. Conflict not reconciled.
36. 4(f)—Ho'omaluhia—4(f) statement not circulated properly.
37. 4(f)—Ho'omaluhia—4(f) statement approval based on insufficient information.
38. 4(f)—Ho'omaluhia—Failure to include non-highway alternatives.
39. 4(f)—Ho'omaluhia—Failure to coordinate 4(f) statement with Army Corps of Engineers.
40. 4(f)—Ho'omaluhia—Failure to disclose conflict of interest.
41. 4(f)—Ho'omaluhia—Failure to conduct all possible planning to minimize harm to the park before 4(f) approval.
42. 4(f)—Ho'omaluhia—Inadequate contents of 4(f) statement.
43. 4(f)—Ho'omaluhia—Failure to demonstrate that no feasible and prudent alternative exists.
44. 4(f)—Ho'omaluhia—Wrongful rejection of feasible and prudent alternative—*Mauka Realignment.*
45. 4(f)—Ho'omaluhia—Wrongful rejection of feasible and prudent alternative—*Makai Realignment.*
46. 4(f)—Ho'omaluhia—Wrongful rejection of feasible and prudent alternative—*No Build.*
48. 4(f)—Pali Golf Course—4(f) statement inadequate, wrong conclusion of no feasible and prudent alternative.
49. CZMA—Failure to comply with coordination provisions.

2. Whether defendants failed to circulate the NHV-SEIS to and obtain and defer to comments from the Board of Water Supply of the City and County of Honolulu (Count Three).

B. EIS Adequacy.

Whether the EIS is inadequate because it:

1. Relies on outmoded and stale studies (Count One).

2. Fails to address the inconsistency of the project with the Oahu General Plan (County Thirty-five).

3. Fails to adequately deal with socio-economic impacts of the project (Counts Sixteen and Thirty-three);

4. Is based upon inaccurate population assumptions. (Count Fifteen).

5. Fails to disclose the impact of the U.S. Coast Guard OMEGA transmitting station upon construction workers and freeway users (Count Seventeen);

6. Is a justification for rather than an examination of the project (Count Eighteen).

C. Further Supplemental EIS (Counts Two, Fourteen and Twenty).

Whether Defendants are required to prepare an additional Supplemental EIS to reflect:

1. Uncirculated studies concerning H-3's environmental aspects;

2. The terms upon which the Secretary's approval of the NHV-SEIS were conditioned; or

3. The applicability of section 4(f) to Ho'omaluhia Park.

D. Project Approval.

Whether the Secretary's decision to pursue a "build" alternative was arbitrary and capricious (Count Twenty-three).

E. Location and Design Approval.

Whether location and design approval for the North Halawa Valley alignment of the project was invalid because:

1. The defendants were committed to the North Halawa Valley corridor prior to the public hearings (Count Twenty-nine);

2. Location and design hearings were improperly held (Counts Thirty, Thirty-one and Thirty-two);

3. The design/location study reports for the project were inadequate (County Thirty-three).

4. The design/location study reports were untimely filed (Count Thirty-four).

F. OMB Circular A-95 Compliance.

Whether defendants complied with the coordination process prescribed by OMB Circular A-95 (Count Twenty-four).

G. Endangered Species.

1. Whether defendants violated the Endangered Species Act with respect to the Oahu Creeper (Count Twenty-six);

2. Whether defendants violated the Endangered Species Act with respect to the *Cyrtandra* (Count Twenty-seven, as amended).

3. Whether constructing H-3 through North Halawa Valley would violate the Hawaii Endangered Species Act, Chapter 195D, Haw.Rev.Stat., by "taking" the I'iwi (County Twenty-eight).

H. Coastal Zone Management.

Whether defendants have complied with the Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 *et seq.* (the "CZMA"), and its implementing regulations, codified at 15 C.F.R. part 930 (1981) (Count Forty-nine, as amended).

I. Section 4(f)—Ho'omaluhia Park.

1. Whether the 4(f) statutes apply to Ho'omaluhia Park (Defendants' Motion for Reconsideration).

2. Whether defendants improperly delegated preparation of the Ho'omaluhia Park 4(f) Statement (Count Forty).

3. Whether defendants failed to coordinate preparation of the 4(f) statement with the agency having jurisdiction over the Park, as required by 23 C.F.R. § 771.19(g)(5) (1980) (Count Thirty-nine).

4. Whether the 4(f) Statement was properly circulated (Count Thirty-six).

5. Whether the 4(f) Statement is inadequate because it fails to:

a. Contain the information required by 23 C.F.R. § 771.19 (i) (1980) (Count Forty-two);

b. Discuss non-highway alternatives (Count Thirty-eight).

6. Whether the Secretary's approval of the 4(f) Statement was based upon adequate information regarding non-highway alternatives (Count Thirty-seven).

7. Whether the Secretary properly concluded that no feasible and prudent alternatives exist to the use of the park (Counts Forty-three, Forty-four, Forty-five and Forty-six); and

8. Whether the 4(f) statement is deficient because it fails to demonstrate that all possible planning to minimize harm to the park has been done (County Forty-one).

J. Section 4(f)—Pali Golf Course.

Whether the Secretary's section 4(f) determination for the Pali Golf Course was proper (Count Forty-eight).

IV. STANDARD OF REVIEW

This court's role in evaluating compliance with the requirements of NEPA is narrowly limited. As stated in *Save Lake Washington v. Frank,* 641 F.2d 1330 (9th Cir. 1981),

> Judicial review of an EIS covers only the issue of whether NEPA's procedural requirements have been met, and whether the EIS performs its primary task of presenting the decision-maker with an environmentally-informed choice. The correct standard is provided in the Administrative Procedure Act, 5 U.S.C. § 706 (2)(D), which directs courts to set aside an agency action if taken "without observance of procedure required by law . . ." [citations omitted]

Id. at 1334.

A court is not to substitute its judgment for that of the agency as to the environmental consequences of its action. Rather, the court must ensure that the agency has taken a "hard look" at environmental factors. *Kleppe v. Sierra Club,* 427 U.S. 390, 410 n.21, 96 S.Ct. 2718, 2730 n.21, 49 L.Ed.2d 576 (1976); *Columbia Basin Land Protection Ass'n v. Schlesinger,* 643 F.2d 585, 592 (9th Cir. 1981).

If the agency has followed the proper procedures, its action will only be set aside if the court finds the action to be "arbitrary and capricious," given the known environmental consequences. *See Columbia Basin Land Protection Ass'n,* 643 F.2d at 596; *Warm Springs Dam Task Force v. Gribble,* 565 F.2d 549, 552 (9th Cir. 1977) (per curiam) (*"Warm Springs Dam I"*).

The court should not be used as a quasi-legislative or quasi-executive forum by those who are dissatisfied with policy decisions made by governing bodies.[10] The environmental laws were neither meant to be used as a "crutch" for chronic fault-finding, nor as a means of delaying the implementation of properly approved projects.

Moreover, an EIS will be found to be adequate if it was prepared in good faith and contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences. *Columbia Basin Land Protection Ass'n,* 643 F.2d at 592; *see Lathan v. Brinegar,* 506 F.2d 677, 693 (9th Cir. 1974) (courts are not permitted to "fly-speck" environmental impact statements).

The extent of judicial scrutiny of the Secretary's 4(f) determination is prescribed by *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1970). In order for the 4(f) determination to have been proper, the Secretary must have (1) properly construed his authority to approve the use of parkland as limited to situations where there are no feasible alternative routes or where feasible alternative routes involve uniquely difficult problems; (2) reasonably believed that such a situation exists in the case at hand; (3) based his decision upon a consideration of the relevant factors; and (4) not made a clear error of judgment. *Id.* at 416, 91 S.Ct. at 823. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency. *Id.*

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[10] One is reminded of the three fundamental rules of planning:

1. Let's make a park out of the other fellow's lot.

2. Let's tighten up the building restrictions—after I've finished my building.

3. Let's raise the gangplank—now that I've landed.

Finally, the burden of proof is on the plaintiffs to establish that the EIS is inadequate or that the Secretary acted improperly in approving the use of parklands. *Monroe County Conservation Council v. Adams,* 566 F.2d 419, 422 (2d Cir. 1977), *cert. denied,* 435 U.S. 1006, 98 S.Ct. 1876, 56 L.Ed.2d 388 (1977).

V. DISCUSSION

In order to evaluate Defendants' compliance with NEPA, the Court must first determine which version of the Council on Environmental Quality regulations (CEQ Regs.) is applicable.[11] 40 C.F.R. § 1506.12 (1980) states in relevant part:

> (a) These regulations shall apply to the fullest extent practicable to on-going activities and environmental documents begun before the effective date. *These regulations do not apply to an environmental impact statement or supplement if the draft statement was filed before the effective date of these regulations.* No completed environmental documents need be redone by reasons of these regulations. Until these regulations are applicable, the Council's guidelines published in the *Federal Register* of August 1, 1973, shall continue to be applicable. In cases where these regulations are applicable the guidelines are superseded. However, nothing shall prevent an agency from proceeding under these regulations at an earlier time. [emphasis added]

Since the effective date of the regulations is November 30, 1979, and the draft NHV-SEIS was filed in 1977, it appears that the environmental documents prepared to date should

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[11] The 1973 CEQ Guidelines were supplanted by the CEQ Regulations adopted November 29, 1978, 43 Fed.Reg. 55990; codified at 40 C.F.R. parts 1500-1508.

be evaluated in accordance with the 1973 CEQ guidelines.[12] However, any further documentation ordered by this court should be prepared in accordance with the 1979 Regulations.

A. NHV-SEIS Preparation.

1. *Delegation of EIS Preparation.*[13]

23 C.F.R. § 771.7 (1980) permits consultants to be used in the preparation of environmental impact statements.[14]

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[12] 40 C.F.R. § 1506.12 (1978) states in relevant part:

> The effective date of these regulations is July 30, 1979, except that for agencies that administer programs that qualify under sec. 102(2)(D) of the Act . . . an additional four months shall be allowed for the State or local agencies to adopt their implementing procedures.

The FHWA was one of the agencies allowed the additional four months.

[13] This cause of action was submitted for the court to determine the following issues:

> (a) Is 23 C.F.R. § 771.7 (1980) invalid as being contrary to 42 U.S.C. § 4332(2)(C) (1975 amendment to NEPA) to the extent that the regulation permits delegation of EIS preparation to other than a State agency or official?
>
> (b) If 23 C.F.R. § 771.7 is valid and if, therefore, it is permissible for an EIS to be prepared by a consultant in the manner described in the text, is it permissible for the H-3 EIS to have been prepared by a consultant which has a financial interest in seeing that H-3 is built?
>
> (c) If it is permissible for the H-3 EIS to be prepared by a financially interested consultant in the manner described, is it permissible to not disclose in the EIS either the manner of EIS preparation or the fact that the consultant is financially interested?

[14] 23 C.F.R. § 771.7 (1974) states in relevant part:

Use of consultants:

> (a) Consultants may be utilized in preparing all types of

Plaintiffs allege that to the extent this regulation permits delegation of EIS preparation to other than a State agency or official, it is contrary to 42 U.S.C. § 4332(2)(C) (1975 amendment to NEPA) and invalid.

Plaintiffs' arguments for invalidating the regulation are unpersuasive. It appears from the legislative history of the 1975 amendment to NEPA (Public Law 94-83) that the section permitting delegation of EIS preparation to State agencies was added to resolve the split in case law which had developed. The issue of consultants was not addressed. It does not appear that Congress intended to prohibit the delegation of EIS preparation to private consultants. I conclude that the regulation is neither contrary to NEPA nor invalid. *See Morton v. Mancari*, 417 U.S. 535, 550, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1973).

This court has previously decided the question of whether preparation of an EIS may be delegated to a financially interested consultant.

> NEPA does not prevent the employment of a private contractor who has a financial interest in the project to draft an EIS. NEPA does require that the final EIS be suffifficiently reviewed and considered by the "responsible official" to insure that it was a part of the decision making process.

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environmental studies and reports. The responsibility for formulating all conclusions and determinations shall remain with the HA and FHWA.

(b) Work by consultants on environmental studies and reports leading to a project decision should be carefully reviewed to insure that complete and objective consideration is given to all relevant project impacts and alternatives. This is particularly important when the same consultants may be involved in subsequent phases of the highway section development.

Life of the Land v. Brinegar, 363 F.Supp. 1171, 1175 (D.Haw.1972), *aff'd* 485 F.2d 460 (9th Cir. 1973), *cert. denied* 416 U.S. 961, 94 S.Ct. 1979, 40 L.Ed.2d 312 (1974).

Testimony at trial established that the consultants, Parsons Brinkerhoff Hirota Associates ("Parsons") prepared the first draft of the NHV-SEIS and submitted it to the State and Federal Agencies for comments and revisions. This process was repeated until the draft was in final form. The FHWA was involved with the preparation of the EIS on an almost daily basis. I find that the FHWA was sufficiently involved in the preparation of the EIS to comply with the requirements of the regulations. *See Essex County Preservation Ass'n v. Campbell*, 536 F.2d 956 (1st Cir. 1976). Finally, I find that under the circumstances, the consultants' financial interest in the outcome of the project need not be disclosed in the EIS. It is sufficient that this interest was known to the agencies responsible for the EIS.

On October 30, 1981, the FHWA adopted a completely revised version of 23 C.F.R. part 771. The new regulations limit the role of private institutions or firms to providing environmental studies and commenting on environmental documents.[15] However, the new regulations also provide that:

> FEIS's accepted by the administration prior to July 30, 1981, whose drafts were filed with the Environmental Protection Agency (EPA) prior to July 30, 1979 (for FHWA November 30, 1979), may be developed in accordance with the regulations in effect at the time the draft document was filed.

23 C.F.R. § 771.109(a)(4) (1981).

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[15] 23 C.F.R. § 771.109(c)(4) (1981) states in relevant part:

> (4) *Other.* In all other cases the role of the applicant is limited to providing environmental studies and commenting on environmental documents. All private institutions or firms are limited to this role.

Since the original draft EIS (Moanalua) was filed with the EPA in 1972, and the Draft NHV-SEIS was filed in 1977, defendants properly applied the older regulations in preparing the NHV-SEIS and Ho'omaluhia Park 4(f) Statement. However, the role that consultants may play in the preparation of any new documentation ordered by this Court will be constrained by the requirements of the new regulation.

2. *Board of Water Supply.*[16]

NEPA requires that copies of the EIS and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, be made available to the public and accompany a proposal through the agency review processes. 42 U.S.C. § 4332(2)(C).

Plaintiffs contend that this statute required the Defendants to (1) obtain and defer to comments from the City

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[16] The parties submitted this issue on stipulated facts for the Court to decide the following questions:

(a) Is the Board of Water Supply a local agency which is authorized "to develop and enforce environmental standards" within the meaning of 42 U.S.C. § 4332(2)(A) and (C)?

(b) Does 42 U.S.C. § 4332(2)(A) and (C) require the State D.O.T. to defer to the expertise of the Board of Water Supply or only require the State D.O.T. to obtain comments from the Board of Water Supply, and if the Defendants are required to defer to the Board of Water Supply, did they do so?

(c) If so, is it permissible for defendants to obtain the comments and view of the Board of Water Supply and not include them in the EIS?

(d) If the comments are required to be included in the North Halawa Valley EIS, is what was included in the NHV-SEIS sufficient to satisfy the statutory requirements?

(e) Does 42 U.S.C. § 4332(2)(A) and (C) require that the Final NHV-EIS with comments be recirculated to the public?

and County of Honolulu Board of Water Supply (the "Board of Water Supply"); and (2) recirculate the Final NHV-SEIS with comments to the public.

Since NEPA only requires consultation with *Federal* agencies having expertise with respect to any environmental impact involved, Defendants were not required to defer to the comments of the Board of Water Supply, a *local* agency. Nevertheless, it is clear from the testimony and other evidence adduced at trial that the Defendants did circulate the NHV-SEIS to and obtain comments from the Board of Water Supply, and that the concerns of the Board of Water Supply were resolved.[17] Finally, NEPA does not require that a Final EIS, with comments, must be recirculated to the public.

B. EIS Adequacy.

1. *Outmoded or Stale Studies.*

Plaintiffs allege that the EIS, as a whole, is inadequate because it relies upon studies conducted between nine and fourteen years ago.

It is a sad fact of environmental litigation that the EIS approval process can stretch over many years. To hold that

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[17] Any remaining doubts as to the project's potential groundwater impacts are alleviated by the following condition to the Secretary's concurrence in the EIS:

> That the final design be coordinated with the Honolulu Board of Water Supply to assure that groundwater impacts are avoided and that coordination with the Board will continue throughout construction of the project. If any conditions are encountered during construction which would significantly threaten the Honolulu Water Supply, construction will stop until a solution acceptable to the Board of Water Supply is agreed upon.

OST Concurrence Memorandum at 2.

studies become invalid merely because of the passage of time would expand this time horizon to infinity. While it is true that circumstances may change over time, such changes can best be handled through the supplementation process prescribed by section 1502.9 of the CEQ Regs., 40 C.F.R. § 1502.9 (1980). Except for portions of the 1973 EDAW socio-economic impact study, discussed below, plaintiffs have failed to demonstrate that any of the studies contained in the 1972 EIS or 1973 Preface are no longer valid.

2. Consistency with the 1977 Oahu General Plan.

The regulations of both the DOT and CEQ require that an EIS discuss the relationship between the proposed action and the land use plans of the affected community.[18] Where conflicts or inconsistencies exist, the EIS "should describe the extent of reconciliation and the reason for proceeding notwithstanding the absence of full reconciliation." 23 C.F.R. § 771.18(h) (1978); 40 C.F.R. § 1500.8(a)(2) (1978).

On January 18, 1977, the City and County of Honolulu adopted a revised Oahu General Plan, which became law

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[18] 40 C.F.R. § 1500.8(a)(2) (1978) states in relevant part:

(a) The following points are to be covered:

(2) The relationship of the proposed action to land use plans, policies, and controls for the affected area. This requires a discussion of how the proposed action may conform or conflict with the objectives and specific terms of approved or proposed Federal, State, and local land use plans, policies and controls, if any, for the area affected . . . . Where a conflict or inconsistency exists, the statement should describe the extent to which the agency has reconciled its proposed action with the plan, policy or control, and the reasons why the agency has decided to proceed notwithstanding the absence of full reconciliation.

23 C.F.R. § 771.18(h) (1980) is similarly worded.

on February 2, 1977.[19] Plaintiffs allege that H-3 is inconsistent with the population and transportation objectives and policies of this plan, and that these inconsistencies are not resolved in the EIS.

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[19] The 1977 General Plan discusses the implementation process and the relationship between the General Plan, Development Plans and zoning ordinances as follows:

> By itself, the General Plan cannot bring about all of the changes and improvements which the City and County government considers to be desirable and attainable. It is, by design, a very general document; and one of its purposes is to establish a coherent set of broad guidelines which can be used in drawing up an islandwide set of Development Plans.
>
> Development Plans, according to the Revised Charter of 1973, are relatively detailed guidelines for the physical development of the Island. They are an intermediate means of implementing the objectives and policies of the General Plan in the various parts of the Island and, as such, are meant to incorporate the provisions for land-use planning which were central to the old General Plan. They are also meant to indicate the sequence in which development will occur.
>
> Development Plans will contain 'statements of standards and principles' with respect to land uses for residential, recreational, agricultural, commercial, industrial, and institutional purposes and with respect to open spaces. In addition, they will contain 'statements of urban-design principles and controls.' They should not, however, be confused with the existing Development Plans, which are basically plans for the improvement of streets and public utilities. Nor should they be confused with zoning ordinances. Zoning ordinances will continue to regulate the use of and within clearly demarcated zones and set detailed standards for the height, bulk, size, and location of buildings.
>
> The new Development Plans will be prepared by the City and County government with the participation of the people of Oahu. Although their focus will be somewhat different than that for the new General Plan—individual areas rather than

It should initially be noted that the H-3 project has been under consideration by Federal, state and local officials for many years. Copies of the NHV-SEIS were circulated to the Oahu Metropolitan Planning Organization (the State/City Cooperating agency), the City and County of Honolulu Department of General Planning and Department of Land Utilization ("DLU") and several other local agencies, none of which have raised any legal challenges to the project. While it is true that the DLU did express a number of concerns as to the consistency of the project with the General Plan, these comments were responded to by the defendants. These comments and responses are reprinted in Vol. VII of the NHV-SEIS at pp. 192-197.

While not conclusive, the failure of the responsible officials to raise any further objections to the project raises an inference that the defendants could reasonably have believed that the project was consistent with the General Plan.

The relationship between H-3 and the General Plan Objectives and Policies is described in Vol. I of the NHV-SEIS at pp. 100-110. It is important to recall that the relevant standard of review is whether this discussion reasonably addresses the pertinent issues. I only decide whether whether the agency could *reasonably* reach the

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the whole of the Island of Oahu—and although their range will be shorter than that of the General Plan, they must nonetheless be fully consistent with the objectives and policies of the General Plan.

General Plan at 14.

The Development Plan for the area in question has not yet been adopted.

The Revised Charter of the City and County of Honolulu requires that the General Plan be reviewed every five years. This review process is presently taking place.

conclusions that it did, not whether those conclusions were *in fact* correct.

Policies three, seven, nine and ten of Transportation Objective "A" encourage the development and use of public transportation on the island of Oahu.[20] *See* 1977 Oahu General Plan at 39-40 (hereinafter cited as "General Plan").

Although the NHV-SEIS only directly discusses the public transportation policies in relation to the (T)H-3 alternative, *see* NHV-SEIS vol. I at 107-109, I find that this issue is adequately addressed in the NHV-SEIS. It is true that this discussion would have been less subject to challenge had the (T)H-3 alternative been approved, but I find that defendants could reasonably have believed that H-3 is consistent with the Transportation Policies of the General Plan.

Population Objective "C" of the General Plan establishes the desired Oahu population distribution for the year 2000.[21] The General Plan envisions limited growth on

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[20] These policies are:

3. Provide transportation services for people living outside the Pearl City—Hawaii Kai Corridor primarily through a system of express- and feeder-buses and limited to moderate highway improvements.

7. Promote the use of public transportation as a means of moving people quickly and efficiently, of conserving energy, and guiding urban development.

9. Promote programs to reduce dependence on the use of automobiles.

10. Discourage the inefficient use of the private automobile, especially in congested corridors and during peak-hours.

[21] The percentage of total population allocated to the various areas is a mean or average figure rather than a rigid require-

the Windward side of Oahu. If Policy 4 of the Population Objective "C" is met, Windward side population will increase in absolute terms, but decrease as a percentage of the total Oahu population from 16.4% in 1975 to 14.4%, plus or minus 0.7%, in 2000. *See* Oahu General Plan at 21.

The population objectives and policies of the General Plan are thoroughly laid out and discussed at pp. 100-104 of the NHV-SEIS.

Defendants assert that H-3 is not inconsistent with these objectives and policies because the highway will not have any long-term growth impacts.

> Land use and development on the windward side of Oahu is currently controlled by the State Land Use District Boundaries and the Oahu General Plan, Development Plans, and zoning ordinances. Given these plans and their continued implementation, *the H-3 facility will not, in and of itsef, induce population growth and futher development of windward Oahu.* The Preface to the Final Environmental Impact Statement (pp. 5-1 to 5-12) does however indicate that, initially, construction of the H-3 facility could accelerate the rate of development on windward Oahu. Thereafter population growth would level off. In any case, *land use densities on windward Oahu can only reach the maximum allowable under the General Plan and Comprehensive Zoning Code with or without H-3.* With H-3, these densities may or may not be reached earlier. [emphasis added]

NHV-SEIS Vol. I at 127.

The court's role is not that of a "super-planner" to determine the correctness of this assertion. It is sufficient

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ment. A year 2000 percentage which falls within 5% of the indicated mean for an area would be consistent with the Plan's population-distribution policy. General Plan at 21.

to pass judicial review that the EIS considered the issue and came to a reasoned conclusion. Challenges to assumptions and conclusions are most appropriately handled through the EIS commenting process.[22]

3. *Socio-Economic Impacts.*

NEPA, 40 C.F.R. § 1500.8(a)(3)(ii) (1978) and 23 C.F.R. § 771.18(i)(1) (1980), require that an EIS assess and discuss the secondary (socio-economic) effects of a project.[23] To data, the only socio-economic impact study commissioned by the Defendants was the 1973 EDAW study reprinted at pages 211-281 of Appendix "B" of the 1973 Preface.[24] In 1974, I held that this study, in conjunction

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[22] It should be noted that defendants apparently assume that the zoning ordinances will be amended to conform with the General Plan. Present zoning on the Windward side will accommodate a population of approximately 157,000, far more than the year 2000 target population of 125,700 to 138,500. However, since the Development Plans must be consistent with the objectives and policies of the General Plan, it is reasonable to assume that the City and County will act advisedly in amending the appropriate zoning ordinances.

[23] 40 C.F.R. § 1500.8(a)(3)(ii) states in relevant part:

> Secondary or indirect, as well as primary or direct, consequences for the environment should be included in the analysis. . . . . For example, the effects of the proposed action on population and growth may be among the more significant secondary effects. Such population and growth impacts should be estimated if expected to be significant . . . and an assessment made of the effect of any possible change in population patterns or growth upon the resource base, including land use, water, and public services, of the area in question.

[24] This study, entitled "H-3 Socio-Economic Study—The Effects of Change on a Windward Oahu Rural Community", was prepared by the consulting firm of Eckbo, Dean, Austin & Williams on December 14, 1973.

with the other discussions of socio-economic effects contained in the 1972 EIS and 1973 Preface, constituted adequate consideration of secondary impacts. *Stop H-3 Ass'n v. Brinegar,* 389 F.Supp. at 1111. Plaintiffs have not persuaded me that this decision was incorrect.

A socio-economic assessment does not have to take the form of a formal "study" and need not be all encompassing. The adequacy of the assessment is governed by a "rule of reason". Conclusions and recommendations may be based upon extrapolations from empirical data, as well as upon the data itself. Although the 1973 EDAW study focused upon the area expected to feel the greatest effects from the implementation of the project, it also considered impacts outside of the study area.

> While it is apparent that the area of potential impacts may well range wider than the study area as defined above, it also appears that the primary socio-economic concerns rest mainly in the study area. Potential Route H-3 impacts in the balance of the Koolaupoko (windward) district would be less severe, in terms of impacts of degree rather than kinds, and could be characterized principally as "more of the same". Potential Route H-3 impacts on the Koolauloa District, further north of the study area, would be of the same kind and nature as impacts within the study area but far less severe due to the mitigating effects of distance.

1973 Preface, exhibit "B" at 229.

Thus, although the study only dealt directly with a relatively small portion of the affected region, the discussion of socio-economic impacts was sufficient to meet the requirements of law.

As noted above in part V.B.2., the 1977 Oahu General Plan significantly altered the planned population distribution for the island of Oahu. The Leeward side of the island

will be developed into a secondary urban center, while growth on the Windward side will be limited. Plaintiffs contend that the 1973 EDAW study must be supplemented to reflect this change.

It is obvious that the portion of the EDAW study which dealt with the effects of the 1969 General Plan is no longer valid. A more difficult question is whether the adoption of the new general plan invalidates the remainder of the study. I find that it does not. Most of the study addresses growth impacts in general terms. Further, the NHV-SEIS extensively discusses the project's secondary impacts in light of the planning changes which have occurred. *See, e.g.,* NHV-SEIS Vol. I at 118-129. Finally, plaintiffs have failed to demonstrate that conditions have changed so much that population growth will have significantly different effects than those described in the EDAW study.

City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975), heavily relied upon by plaintiffs in support of their contention that defendants cannot attribute growth impacts to the General Plan rather than the highway, is readily distinguishable from the case at hand.

In *City of Davis,* the City itself challenged the construction of a freeway interchange designed to stimulate and service future industrial development in the neighboring Kidwell area. Davis and the Kidwell area were in different counties. Expert opinions and studies that Davis introduced during the litigation showed that such development could place severe demands upon and contaminate Davis' water supply, disrupt the City's policy of controlled growth, and increase demand for city services without providing a corresponding increase in the City's tax base. Defendants attempted to justify their failure to prepare an EIS on the basis of a three-judge "Negative Declaration of Environmental Impact," which concluded that the project would have no significant adverse environmental effects. The Negative Declaration did not consider any of the

project's possible impacts upon Davis. Similarly, the Design Study Report submitted to the FHWA dismissed secondary effects as "speculative" and "uncertain". The court found that although the nature and extent of development which the project will induce is uncertain, it was unreasonable for the defendants to conclude, *without further study,* that the environmental impact of the proposed interchange would be insignificant. *See id.* at 675.

In the case at hand, a socio-economic assessment was made and included in a properly circulated EIS. Further, Honolulu is in the rather unique position of having a single statement of long-range social, economic, environmental and design objectives for the entire island. Thus, unlike the situation in *City of Davis,* conflicting growth and development plans for adjoining areas are resolved by a single body. Finally, as previously noted, the City and County of Honolulu has not raised any legal challenges to the EIS or the project itself.

I find that it was reasonable for the defendants to assume that construction of H-3 will not adversely affect the City's efforts to implement the General Plan and that the discussion of socio-economic impacts was sufficient to meet the requirements of NEPA.

4. *Population Assumptions.*

40 C.F.R. § 1500.8(a)(1) (1978) requires agencies to *identify* the population and growth characteristics of the area affected by its action and the population and growth assumptions used to justify the project or program or to determine secondary impacts resulting therefrom.[25]

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[25] 40 C.F.R. § 1500.8(a)(1) (1978) states in relevant part:
Agencies should also take care to identify, as appropriate, population and growth characteristics of the affected area and any population and growth assumptions used to justify the

The population figures used in the General Plan, and consequently in the NHV-SEIS, were derived from the "Series E-2" population projections issued by the State Department of Planning and Economic Development ("DPED") in 1974 to promote uniformity and consistency in Federal, state, county, and private planning work. Oahu population was forecast to reach 1,039,000 by the year 2000. Applying the General Plan distribution percentages to this figure yielded a target Windward side population of between 142,300 and 156,900. However, as stated in the General Plan,

> The figure of 1,039,000 for the year 2000 and the corresponding distribution of the population to the various designated areas . . . will be revised as the State Department of Planning and Economic Development ["DPED"] revises its population projections.

General Plan at 21.

On March 1, 1978, the DPED issued a new set of projections, designated "II-F", designed to refine and update the E-2 series. Projected year 2000 Oahu population was revised downwards from 1,039,000 to 917,400. Applying the General Plan distribution percentages to this new figure yields a target Windward side population of between 125,700 and 138,500. It should be noted, however, that the Series E-2 and II-F projections only forecast *total* Oahu population and do not provide regional breakdowns.

All of the population projections used in developing the traffic projections for the H-3 corridor were derived from the Series E-2 population projections. The NHV-

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project or program or to determine secondary population and growth impacts resulting from the proposed action and its alternatives . . . .

SEIS fails to discuss the series II-F projections, even though they were issued nearly two years before the NHV-SEIS was approved.

The Route H-3 Travel Demand Analysis assumed a Windward side population of 150,000, based upon the series E-2 projections. This assumption was reconsidered by the FHWA in light of the Series II-F projections. *See* FHWA Region 9 Staff Analysis, App. "B". The FHWA apparently concluded that the General Plan population distribution goals would not be met, and decided that based upon a year 2000 Oahu population of 917,400, it was appropriate to continue to use a Windward population of 150,000 in its travel demand analysis.

Defendants' apparent assumption that the General Plan goals will not be met and year 2000 Windward side population will be approximately 150,000 may be correct. However, this assumption contradicts defendants' assertion that growth will be limited by the General Plan. It would have been wiser for the FHWA to have considered whether the project would still be viable if General Plan population goals are met. Nonetheless, I find that defendants did meet their responsibility of *identifying* the population and growth assumptions used to justify the project.

5. *The OMEGA Station.*

The U.S. Coast Guard operates an OMEGA Navigation Station in Haiku Valley. The transmitting antenna consists of six insulated spans which extend across the valley and are fed at the center by a multi-conductor downlead system connected to the transmitter building. The antenna ground system consists of a dense network of copper conductors extending radially outward from the transmitter building for a distance of 1100 feet. Strong electric and magnetic fields exist in the region between the antenna and the ground system.

As originally planned, the Windward viaduct of the project would largely have avoided the ground system. Because the location of the trans-Koolau tunnel portal in Haiku Valley had been determined based upon the location of H-3 in Moanalua Valley, the corridor shift to North Halawa Valley increased the tunnel length from just under 5,000 feet to over 8,400 feet. During the preliminary investigations and design of the North Halawa Valley alignment, it was determined that the required tunnel length (and hence construction costs) could be reduced significantly by shifting the location of the Haiku portal and lengthening the Windward viaduct, but that such a shift would require that a portion of the Windward viaduct pass directly over the ground system.

In late 1977, Defendants contacted the Coast Guard to pursue the concept of H-3 and OMEGA collocation. Continued coordination with the Coast Guard led to a study which was conducted by the electronics consulting firm of Kershner & Wright. The study was primarily concerned with the effects of the proposed viaduct upon the OMEGA Station, although it also dealt with the effects of the transmitter upon the highway and its users. The consultants considered two alignments of the Windward Viaduct, the original configuration (Alignment "A") and the proposed change (Alignment "B").

The first phase of the study concluded that the highway could be constructed and operated without reducing the effectiveness of the OMEGA station, and that the hazards involved in the construction and operation of the highway could be controlled or maintained at negligible levels. NHV-SEIS Vol. VI, appendix "M" at 26. This conclusion applied to both alignments. *Id.* Phase II of the study dealt with the technical modifications necessary to maintain the performance of the ground system and the antenna.

As a result of the studies, the proposal was modified to reflect the adoption of Alignment "B". This change is discussed in Vol. I of the Final NHV-SEIS at pp. xxxvi-xxxix. Copies of both reports were included as Appendix "M" in Vol. VI of the NHV-SEIS, but were never circulated to the public, ostensibly because they were prepared too late to be included in the Draft NHV-SEIS.

Plaintiffs allege that the reports (1) are substantively inadequate and (2) contain "new and significant" information that must be circulated to the public in the form of a supplemental EIS. In particular, plaintiffs challenge the report's discussion of the potential hazards of the OMEGA Station's electromagnetic radiation upon heart pacemaker wearers, construction workers and highway users.

Mere disagreements among experts will not invalidate an EIS. *Life of the Land v. Brinegar,* 485 F.2d 460, 472 (9th Cir. 1973), *cert. denied,* 416 U.S. 961, 94 S.Ct. 1979, 40 L.Ed.2d 312 (1974); *Kentucky ex rel. Beshear v. Alexander,* 655 F.2d 714, 720 (6th Cir. 1981). An expert opinion contrary to that expressed in an EIS should be submitted to the agency responsible for the EIS for consideration as "new and significant" information. A court cannot be expected to decide the relative merits of conflicting expert opinions.

Although a plaintiff cannot quibble with the assumptions and conclusions made by an expert within his area of expertise, he may attempt to demonstrate that the author of a study was incompetent to address particular issues. By his own admission, the preparer of the report in question was not an expert on biological effects of electromagnetic radiation. On the other hand, he was qualified to conclude, as he did, that through proper shielding techniques, the electric field strength in the vicinity of the highway could be reduced to negligible levels. I find that the studies and the discussion of H-3/OMEGA Collocation

contained in the Final NHV-SEIS would have been sufficient to meet the requirements of NEPA had the proper procedures been followed. The safety concerns raised by plaintiff are not sufficient to invalidate the reports. Defendants have a responsibility to consider this information if it is presented to them. However, that examination process is outside of the scope of this lawsuit.

It is undisputed that the information contained in the studies is "new". However, defendants contend that since the electric field strength can be reduced to "safe" levels, the new information is not "significant", citing *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017 (9th Cir. 1980) (*"Warm Springs Dam II"*). I find that their reliance is misplaced. In that case, information about a potentially serious earthquake hazard came to the attention of the Corps of Engineers after the publication of a supplemental EIS. The study in question challenged a basic design assumption for a proposed dam. The Corps considered the information, conducted an extensive study of their own, and concluded that their original assumptions were correct. The court found that the Corps' decision not to prepare and circulate a supplemental EIS reflecting the issues raised by the study was reasonable.

Here, the highway design must take the OMEGA Station electric field effects into consideration. This fact alone demonstrates that the information is significant. Further, the trans-Koolau tunnel alignment was altered as a result of the studies. The situation here thus differs from that in *Warm Springs Dam II*, where the new information did not necessitate any changes in the project.

6. *Justification vs. Examination.*

The purpose of an EIS is to serve as the means of assessing the environmental impact of proposed agency actions, rather than as a justification for decisions already

made. *See* 40 C.F.R. § 1500.7(a) (1978). Plaintiffs allege that defendants violated this regulation because the 1972 EIS, 1973 Preface, Moanalua Valley 4(f) Statement, and 1977 NHV-SEIS were prepared not as a means of assessing the environmental impact of H-3, but rather as justifications for prior decisions to build the project through the designated valleys. I find no merit to this contention.

The fact that an agency prefers one alternative over another does not violate NEPA. What is important is that the decision to proceed with the action not be made until the EIS process has been completed. The facts are clear that events followed the required sequence in this case.

C. Further Supplemental EIS.

A federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions. *Warm Springs Dam II* at 1023; *see* 42 U.S.C. §§ 4332(2)(A), (B).

Pursuant to 40 C.F.R. § 1502.9(c)(4) (1980) and 23 C.F.R. § 771.15 (1980), the FHWA is required to prepare a supplemental EIS when (1) changes are made in the proposed action that will introduce a new or changed environmental effect of significance to the quality of the human environment, or (2) significant new information becomes available concerning the action's environmental aspects. A supplemental EIS is to be processed in the same manner as a new EIS (draft and final). The supplementation process applies to both draft and final EISs.[26]

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[26] 23 C.F.R. § 771.15 states:

> A *draft EIS* or final EIS may be supplemented at any time. Supplements will be necessary when substantial changes are made in the proposed action that will introduce a new or changed environmental effect of significance to the quality of the human environment or significant new information becomes available concerning the action's environmental aspects.

Thus, if significant new information becomes available while an EIS is in draft form, the draft must either be recirculated or supplemented. It is not sufficient that the new information is incorporated into the final EIS.

An agency's decision not to supplement an EIS in light of new information will be upheld if reasonable. *Warm Springs Dam II*, 621 F.2d at 1024.

> When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require implementation of formal NEPA filing procedures. Reasonableness depends on such factors as the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency considered the information and evaluated its impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data.

Id.

1. *Uncirculated Studies.*

Vol. VI of the NHV-SEIS contains a number of studies, none of which were circulated to the public. Plaintiffs contend that these studies contain significant new information which must be reflected in a supplemental EIS.

As discussed in part V.B.5., *supra*, I find that the H-3/OMEGA Station Collocation Studies contain "new and

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The decision to prepare and process a supplement to the final EIS shall not void or alter FHWA approval actions given prior to the decision, or void or alter previously authorized development of the highway section not directly affected by the changed condition or new information. A supplement is to be processed in the same manner as a new EIS (draft and final). [emphasis added]

significant" information. Although collocation was discussed in the Final NHV-SEIS, defendants failure to circulate the information in draft EIS form necessitates the preparation of a further supplemental EIS.

I find that none of the other studies are "new and significant". It should first be noted that NEPA does not require that supporting studies be physically attached to the EIS. It is sufficient if they are available and accessible. *Coalition for Canyon Preservation v. Bowers,* 632 F.2d 774 at 782 (9th Cir. 1980); *Trout Unlimited v. Morton,* 509 F.2d 1276 at 1284 (9th Cir. 1974). Thus, the studies themselves need not be circulated as a supplemental EIS, provided that their findings are discussed and referenced in a properly circulated supplemental EIS.

While it is true that Dr. Robert Schallenberger's 1978 Avifaunal study, NHV-SEIS Vol. VI, appendix "K", did provide additional information regarding the avian population and habitat of the Central Ko'olau Range, it was reasonable for defendants to conclude that this study did not provide significant new information concerning the project's environmental effects. At defendants' direction, Dr. Schallenberger had conducted two prior avifaunal surveys of North Halawa Valley. The results of these surveys were incorporated into an extensive discussion of the effects of the project upon the bird life in the valley. *See* NHV-SEIS Vol. I at 165-70. These studies concluded that H-3 would have a significant adverse impact upon such life. The 1978 study merely reinforced this conclusion.

In consonance with DOT's urban transportation policy, FHWA Region 9 reexamined the H-3 proposal to insure that the alternatives involving the rehabilitation of existing highways were given adequate consideration. The study, referred to as the "Region 9 Staff Analysis", covered 16 different alternatives, including contra-flow bus lanes, banning of trucks during peak hours, and one-way operation

of either Likelike Highway or Pali Highway during peak hours.

The Region 9 Staff Analysis contained a detailed cost-benefit analysis of the different alternatives. The fact that the Secretary's selection of the H-3 alternative instead of the recommended (T)H-3 alternative was largely based upon the results of the cost-benefit analysis indicates the significance of this information. I therefore conclude that the Region 9 Staff Analysis also is "new and significant" information within the meaning of the relevant regulations.

2. *Terms of Approval.*

One of the terms upon which the Secretary's concurrence in the EIS was conditioned was:

> That the project include all FHWA recommendations—construction of a 4-lane H-3; *implementation of a one lane reversible bus lane on the Likelike;* provision for passenger transfer facilities at the Likelike Highway and the H-3 interchange in conjunction with the proposed Honolulu Area Rapid Transit System; and further study of transportation system mananagement [*sic*] measures, including peak hour prohibition of trucks on the Likelike and Pali Highways. [emphasis added]

Office of the Secretary Concurrence Memorandum (Nov. 21, 1980).

Plaintiffs contend that a supplemental EIS must be prepared to reflect the required implementation of the reversible bus lane, provision for passenger transfer facilities, and the approval of the 4-lane H-3 alternative.

The FHWA interpreted the condition requiring implementation of the reversible bus lane to mean that the standard highway development process for the bus lane will proceed simultaneously with the design and ultimate

construction of H-3. The correctness of this interpretation was confirmed by the Director of the Office of Environment and Safety. There was testimony at trial that a project which undergoes the standard development process will not necessarily be constructed. It thus appears that the highway and the bus lane are separate projects. While it is certainly possible that an EIS for the bus lane may ultimately be necessary, the environmental effects of the bus lane need not be considered in the H-3 EIS.

An EIS need not be supplemented merely because an alternative other than the one preferred by the preparer is selected. Indeed, one of the purposes of an EIS is to help a decision maker to choose among competing proposals. I find that since the 4-lane H-3 alternative was adequately discussed in the NHV-SEIS, a further supplemental EIS reflecting the selection of that alternative is not required.

3. *Ho'omaluhia Park.*

As more fully discussed in part V.I., *infra,* the area surrounding the Kaneohe Flood Control Project was developed into a major regional park (Ho'omaluhia) after the windward alignment of the project was established and the 1972 EIS and 1973 Preface had been prepared. Pursuant to this court's order of November 21, 1978, Defendants prepared a 4(f) statement addressing alternatives to the proposed constructive use of the park. This statement did not undergo the normal EIS circulation process.

I find that the development of Ho'omaluhia Park and the project's potential impacts upon it are new and significant information which must be reflected in a supplemental EIS.

D. Project Approval.

Plaintiffs contend a comparison of the projected construction costs and environmental and socio-economic im-

pacts of H-3 with the expected benefits from the project renders the selection of other than a no-build alternative arbitrary and capricious and a clear error in judgment.

As noted above, judicial review under NEPA is very narrow. A court may require an agency to follow procedural requirements of NEPA and *consider* environmental factors, but cannot determine the weight to be accorded such factors. As long as a decision is based upon legitimate considerations, it cannot be set aside as "arbitrary and capricious". *See Columbia Basin Land Protection Ass'n*, 643 F.2d at 596.

As stated in *Strykers' Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 100 S.Ct. 497, 62 L.Ed.2d 433 (1979) (per curiam),

> *Vermont Yankee* [*Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978)] cuts sharply against the Court of Appeals' conclusion that an agency, in selecting a course of action, must elevate environmental concerns over other appropriate considerations. On the contrary, once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot " 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.' " [citations omitted]

Id. at 227, 100 S.Ct. at 500.

Defendants have demonstrated the need for an improvement in trans-Koolau transportation. Whether I would have balanced the competing interests in the same manner or reached the same conclusion as did the Secretary is immaterial. I cannot set aside his determination if it was based on legitimate considerations. However, because the

defendants have violated the procedural requirements of NEPA and the CEQ and DOT regulations by failing to prepare a supplemental EIS addressing the new and significant information, I must set aside the Secretary's decision on procedural grounds and need not reach the substantive issue. Had the new information become available after the approval of the NHV-SEIS, potential relief would at best have been limited to requiring the Secretary to reconsider his decision in light of the new information.

E. Location and Design Approval.

1. *Prior Commitment.*

Plaintiffs have failed to establish that the defendants were impermissibly "committed" to the North Halawa Valley corridor prior to the H-3 corridor hearings of December 1977. Further, it is doubtful that such a commitment would in itself constitute a violation of the DOT Regs.

The first H-3 corridor studies took place in 1965. The trans-Koolau corridors were re-examined in detail during the preparation of and hearings for the 1972 EIS. These studies and hearings removed from further consideration the Manoa Valley, Nuuanu Valley, Kalihi Valley and South Halawa Valley corridors. The Secretary's 1976 determination that there existed feasible and prudent alternatives to Moanalua Valley eliminated that corridor from consideration. The only remaining trans-Koolau corridor was North Halawa Valley. The alternate corridors were again reexamined prior to the preparation of the NHV-SEIS. There has been no serious suggestion that any of these corridors are viable alternatives to North Halawa Valley or that their prior rejection should be reconsidered. It would thus be absurd to require defendants to hold further hearings as to their desirability.

2. *Combined hearings.*[27]

The relevant facts are not in dispute. Defendants held combined corridor and design hearings as to the H-3 North Halawa Valley (NHV) alignment of December 12-15, 1977. Simultaneous location and design approval was given on February 3, 1981. The issue before this court is whether the defendants properly combined the corridor and design hearings for the H-3 NHV alignment.

A key issue with regards to these causes of action is the meaning of "project". Plaintiffs suggest that the individual sections of the highway, *e.g.*, the Halekou interchange, Windward viaduct and trans-Koolau tunnels be considered as separate "projects", since separate construction contracts will be let for each of them. Such a restrictive definition is contrary to the intent of the relevant statutes.[28]

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[27] These causes of action were submitted for the court to determine the following issues:

(a) Were the combined corridor and design hearings held in 1977 were held in violation of the applicable regulations and statutes?

(b) If it was a violation of applicable regulations and statutes to hold combined location and design hearings, is the proper remedy to invalidate corridor approval and order new separate corridor and design public hearings?

[28] 23 C.F.R. § 1.2 (1980) states in relevant part:

(a) Terms defined in 23 U.S.C. 101(a) shall have the same meaning where used in the regulations in this part, except as modified herein.

(b) The following terms where used in this part shall have the following meaning:

. . . .

Project. An undertaking by a state highway department for highway construction, including preliminary engineering, acquisition of rights-of-way and actual construction, or for high-

A highway connecting two logical termini may be considered a single project for planning purposes, even though the construction phase may be broken down into several separate contracts. *See Lathan v. Brinegar,* 506 F.2d 677 (9th Cir. 1974).

With respect to location approval, this court has previously held that the H-3 "project" encompasses the entire highway connecting the Halawa and Halekou interchanges.

> [W]hatever administrative convenience may be served by dividing the proposed highway into segments, for purposes of public hearings it is one project. Construction of the Leeward segment up to the Koolau Mountains makes no sense without the Windward segment up to the other side of the Koolau Mountains, and neither segment makes sense unless both are connected by a tunnel through the mountains.

Statement of Facts Conclusions of Law and Order, July 13, 1973. Further, in the Order Interpreting Injunction issued April 21, 1981, this court ruled that the NHV and Moanalua Valley alignments of H-3 were alternate routings of the same project.

23 C.F.R. § 790.5(g) (1980) permits combined corridor and design hearings to be held for projects which have had prior public hearings.[29] Public hearings were held for

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way planning and research, or for any other work or activity to carry out the provisions of the Federal laws for the administration of Federal aid for highways.

[29] Although the regulations contemplate that a design public hearing will be held *after* the route location has been approved, *see* 23 C.F.R. § 790.3(b) (1980), 23 C.F.R. § 790.5(g) (1980) states:

> (g) With respect to any project for which a public hearing has been held under Federal-aid procedures, and for which it is determined by the State highway department and the

the Moanalua alignment of the project. It was therefore proper for defendants to combine the corridor and design hearings for the NHV alignment. Since a valid design hearing was held, design approval was not improper on the grounds asserted in this cause of action.

3. *Adequacy of Study Reports.*

A request for location or design approval must be accompanied by reports and other documents which, *inter alia,* discuss the anticipated economic, social, and environmental effects of the proposed action and alternatives under consideration. 23 C.F.R. §§ 790.9(c), 790.8(b)(2)(i) (1980). The H-3 Location/Design Study Report, NHV-SEIS, 1973 Preface and 1972 EIS were submitted as evidence of compliance with this requirement. Plaintiffs challenge the adequacy of these reports with respect to socio-economic impacts and infrastructure availability.

As more fully discussed in part V.B.3., *supra,* the EIS adequately discusses the socio-economic impacts of the project. Similarly, I find that defendants reasonably concluded that the extensive planning process for Oahu in general and the windward side in particular will insure that future infrastructure requirements will be met.

Division Administrator that a new hearing is desirable to consider supplemental information on social, economic, or environmental effects relative to proposals presented at a previous public hearing to with respect to additional proposals, then, as appropriate, a new corridor or design hearing should be held. When recommended by the State and approved by the Division Administrator, *a new corridor hearing held in accordance with this section may be combined with the design hearing, whether or not a design hearing for the project has been previously held.* In such instances, the location shall be reconsidered and a new request for location approval shall be submitted together with the request for design approval. [emphasis added]

4. Timeliness of Study Report Filing.

Location and design approval is governed by 23 C.F.R. part 790 (1980). If location or design approval is not requested within three years after the date of the respective hearings, new hearings must be held. 23 C.F.R. §§ 790.5 (d), (e) (1980).

Location/Design hearings were held from December 12-15, 1977. Location/Design approval was requested on December 10, 1980. Although the reports and studies analyzing the project were somewhere within the FHWA bureaucracy on the date of the request, they did not arrive at FHWA Region 9 Office (the office where the request for approval was filed) until between two and five days after the three-year time period for requesting approval had lapsed. The decision to proceed with the project was not made until all of the required documents had been submitted.

The stipulated question for this cause of action is whether the applicable regulations require that the appropriate documentation *physically* accompany a request for location/design approval, or whether it is sufficient that such documentation may be found as of the day of the request somewhere in the FHWA bureaucracy.

To hold that the three year period during which location or design approval may be requested is tolled only when all of the documents supporting the request are physically present in the particular FHWA office where the request is filed would inject a needless technical requirement into an already complex process. I conclude that it is sufficient that the documents are in the hands of and have been previously reviewed by the FHWA at the time of the request.

F. OMB Circular A-95 Compliance.

Office of Management and Budget ("OMB") Circular A-95 (revised), 41 Fed. Reg. 2052 (Jan. 13, 1976), provides for coordination between Federal, state and local agencies with respect to Federal and federally assisted projects.

23 C.F.R. part 420, subpart C, implements the regulations in OMB Circular A-95 with respect to FHWA and Urban Mass Transit Administration ("UMTA") projects. 23 C.F.R. part 450, subpart A, defines the relationship between state Metropolitan Planning Organizations ("MPOs") and state A-95 coordinating agencies. I find that the Defendants have complied with the above-described coordination requirements.

G. Endangered Species.

1. *The Oahu Creeper.*

This cause of action raises two legal issues: (1) whether or not the biological opinion issued by the USFWS regarding the impact of the H-3 project upon the Oahu Creeper was inadequate or otherwise improper as a matter of law and (2) whether defendants are under a legal obligation to continue the biological consultation process with the USFWS.

As an initial matter, the USFWS is not a party to this lawsuit, so even if the biological opinion had been legally erroneous, this court would not have the power to force the USFWS to reconsider its decision or reinitiate consultation. Nevertheless, defendants have demonstrated that they have met their initial consultation responsibilities under the Endangered Species Act.

On September 11, 1978, the USFWS issued a formal biological opinion, pursuant to section 7(b) of the En-

dangered Species Act, that the H-3 project was not likely to jeopardize the continued existence of the Oahu Creeper. Plaintiffs contend that this opinion was "arbitrary, capricious, an abuse of discretion, a clear error in judgment and otherwise not in accordance with law." Complaint ¶ 355 at 74.

50 C.F.R. § 402.04 (1980) governs the consultation process under the Endangered Species Act. Plaintiffs do not allege, nor do I find, that defendants violated the procedural requirements of this regulation. Rather, plaintiffs argue that the conclusion reached by the USFWS was clearly erroneous and based upon inadequate information.

The facts do not support either of these contentions. The USFWS biological opinion was based upon Dr. Robert Schallenberger's 1978 Avifaunal Study, NHV-SEIS vol. VI app. K. The study took place from December 1977 through February 1978. During this period, only one positive and two possible sightings of the Oahu Creeper occurred in the North Halawa Valley. While it is true that conditions for bird sighting were suboptimal at the time of the survey, it cannot be concluded that *as a matter of law* the survey data was insufficient to support a biological opinion or that the conclusion drawn from the data was clearly erroneous. Based upon the survey, the USFWS could reasonably have concluded that the H-3 project is not likely to jeopardize the existence of the Oahu Creeper.

Even a biological opinion based upon inadequate information would not have been per se invalid. In the case of an incomplete opinion rendered upon inadequate information, the law merely imposes upon the Federal agency the continuing obligation to make a *reasonable* effort to develop that information. *North Slope Borough v. Andrus,* 486 F. Supp. 332, 352 (D.D.C.1979), *mod. on other grounds,* 642 F.2d 589 (D.C.Cir.1980); H.Conf.Rep. No. 96-697, 96th Cong., 1st Sess., *reprinted in* [1979] U.S. Code Cong. & Ad.News 2557, 2576; 50 C.F.R. § 402.04(f).

The issue of data adequacy was decided by the USFWS when it issued its formal biological opinion. It may be true that the decision was not clear-cut, but this court must defer to the reasonable conclusion stated in the biological opinion letter:

> In essence, we have very little data for providing an opinion but feel it would be *unreasonable* to request a study which would be unlikely to provide definitive results. [emphasis added]

Pursuant to 50 C.F.R. § 402.04(e), once the USFWS has issued its biological opinion, no further consultation is *required*. In their request for formal consultation regarding the *Achatinella*, Defendants inquired of the USFWS whether further consultation was required. By letter dated October 7, 1981, the USFWS responded that no further consultation was necessary.

2. *The* Cyrtandra.

Section 7(c)(1) of the Endangered Species Act states in relevant part:

> To facilitate compliance with the requirements of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on *November 10, 1978*, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action [a "section 7(c) species list"]. [emphasis added]

16 U.S.C. § 1536(c)(1) (as amended 1978).

Defendants did not make such a request until October 2, 1981.

Plaintiffs contend that if a timely request for the Section 7(c) species list had been made, then (1) defendants would have been apprised that new species of the *Cyrtandra* may exist in North Halawa Valley; (2) defendants would have discovered these new species; and (3) these species would have been placed on the Section 7(c) species list.

With respect to this cause of action, Plaintiffs urge the court to block development of H-3 until the defendants have completed formal biological consultation with the USFWS, addressing the new species of the *Cyrtandra,* pursuant to sections 7(a) and (b) of the Endangered Species Act.

It is undisputed that the new species of *Cyrtandra* are neither listed nor proposed to be listed as endangered species. Formal consultation addressing these species is thus clearly not required under the ESA. Further, it is doubtful that the provision underlying this cause of action is even applicable to defendants, since it only applies to agency action for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978. As noted before, construction of the H-3 project (the Halawa and Halekou interchanges) began in 1972.

3. *The I'iwi.*

The I'iwi [a Hawaiian bird] is considered endangered on Oahu. It is not considered endangered on any of the other islands in this state, nor is it listed as an endangered species by the USFWS. Plaintiffs contend that constructing H-3 through the North Halawa Valley will destroy the habitat of the I'iwi, thereby "taking" it in violation of Haw.Rev.Stat., Chapter 195D.[30]

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[30] Haw.Rev.Stat. § 195D-4(e) states in relevant part:

> Prohibited acts. With respect to any endangered species of

The enforcement provision of Haw.Rev.Stat., Chapter 195D states that:

> Any employee or agent of the department upon whom the board of land and natural resources has conferred powers of police officers, including the power to serve and execute warrants and arrest offenders or issue citations throughout the State, and any police officer of the counties of this State shall have the authority to enforce any of the provisions of this chapter or any regulation or rule promulgated pursuant hereto.

§ 159D-7 [sic], Haw.Rev.Stat.

Since the statute contains a specific enforcement provision, I conclude that a private right of action does not exist.[31] Further, an injunction would be an inappropriate remedy even if Plaintiffs did have a private right of action, since § 195D-9, Haw.Rev.Stat., provides *criminal* sanctions for violation of the chapter.

Finally, even if a private right of action did exist, it does not appear that constructing H-3 through North Halawa Valley will "take" the I'iwi. As defined in § 195D-2(j), "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect endangered species of wildlife . . . or to attempt to engage in any such conduct". Destruction of habitat is not covered by the statute.

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wildlife or plant, it is unlawful, . . . , for any person subject to the jurisdiction of this State to:

(2) Take any such species within this State;

[31] In relevant part, Haw.Const. art. XI, § 9 states:

Any person may enforce this right [to a clean and healthful environment] against any party, public or private, through appropriate legal proceedings, *subject to reasonable limitations and regulation as provided by law.* [emphasis added]

Plaintiffs argue that this provision entitles them to a private right of action. I find that it does not.

H. Coastal Zone Management.

Pursuant to the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. § 1451 *et seq.*, and its implementing regulations, 15 C.F.R. part 930 (1981), Federal agencies are required to conduct their activities in a manner consistent with state CZM programs.

Agency actions are divided into four categories: (1) Federal Activities, 15 C.F.R. part 930C; (2) Activities Requiring a Federal License or Permit, 15 C.F.R. part 930D; (3) Outer Continental Shelf Exploration, Development and Production Activities, 15 C.F.R. part 930E; and (4) Federal Assistance to State and Local Governments, 15 C.F.R. part 930F.

H-3 falls into category (4), Federal Assistance. *See* Procedures Guide for Achieving Federal Consistency with the Hawaii Coastal Zone Management Program, at exh. "B". I find that Defendants have fully complied with the requirements of the CZM statutes and regulations. Plaintiffs' other contentions with respect to this cause of action are without merit.

I. Section 4(f)—Ho'omaluhia Park

Background.

Ho'omaluhia Park began as a flood control project developed by the Army Corps of Engineers. Between 1966 and 1970, when the flood control project was authorized, the concept of the park was expanded from approximately 35 acres of "green-belt" surrounding the flood-control dam and reservoir, to 75 acres. In 1973, the proposed park was further expanded to 115 acres, taking into consideration the planned windward alignment of H-3. A 115 acre area between the park and the highway was to act as a "buffer zone" between the two projects. This area was subsequently purchased by the City and County and incorporated

into the project, making the boundary of the park contiguous with the proposed highway right-of-way. A master plan for the park was adopted in February, 1974. The plan restricted all of the park's intensive uses, *i.e.*, camping and picnicking, to the interior 115 acres of the park. The intensive use area is isolated from the highway by a peripheral park circulation road and a low density recreational use zone (primarily trails and open space).

1. *Motion to Reconsider*

Defendants contend that since the park boundaries were determined after the freeway alignment was established, the protections of 4(f) should not apply. Their argument is not without merit. As noted above, the park design took into account the potential impacts of the freeway. In addition, the flood-control reservoir was sized to accommodate the inflow of sediment resulting from the construction of the highway, and landscaping and other measures are planned to visually shield the park from the highway. Defendants also argue that to extend the coverage of the 4(f) statutes to include parks which are planned concurrently with highways would discourage the development of such parks.

While defendants' arguments are intuitively appealing, their position is contrary to the explicit statutory mandate that the Secretary not approve *any* program or project which requires the use of parkland unless the provisions of the 4(f) statutes are complied with.

The 4(f) statutes were enacted to prevent public parks from being converted into masses of concrete and asphalt. As stated in *Overton Park,* 401 U.S. at 412, 91 S.Ct. at 821.

> [T]he very existence of the statutes indicates that protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly un-

> usual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. [footnotes omitted]

Id.

More specifically,

> These statutes prohibit the Secretary of Transportation from authorizing the use of federal funds to finance the construction of highways through public parks if a "feasible and prudent" alternative route exists. If no such route is available, the statutes allow him to approve construction through parks only if there has been all possible planning to minimize harm" to the park. [footnotes omitted]

Id. at 405, 91 S.Ct. at 817.

The statutory protections of 4(f) have been judicially extended to include constructive use as well as physical taking of parkland. *See, e.g., Brooks v. Volpe,* 460 F.2d 1193 (9th Cir. 1972).

Constructive use is not an easily defined concept. The fact that traffic noise can be heard or that a highway can be seen from a park does not necessarily mean that the park is being "used" by the highway. The degree or existence of constructive use depends upon both the nature of the park and the degree of impacts from the highway. For example, a park circulation road or parking lot would be much less affected by highway noise than would a picnic area or campsite. Mitigation measures such as landscaping and noise barriers may reduce the impact of a highway sufficiently to eliminate park "use". However, absent strict application of the 4(f) statutes, highway departments would have no incentive to take such measures, especially

where it would be costly to implement them. Application of section 4(f) is thus appropriate in this case.

The fact that a park and a highway are jointly developed may be sufficient to establish that there are no feasible and prudent alternatives to the use of such park. At the very least, joint development should simplify efforts to minimize harm to the park.[32] However, for the reasons stated above, defendants' Motion to Reconsider is denied.

2. *Delegation*

For the reasons stated in the section discussing delegation of the preparation of the EIS, *supra,* I hold that preparation of the Ho'omaluhia Park 4(f) statement was not improperly delegated.

3. *Coordination.*

The following facts with regards to this cause of action are not disputed: (1) Ho'omaluhia Park was developed by the Corps of Engineers in conjunction with its Keapuka flood control project; (2) during this period, the Corps of Engineers had control of the park property; (3) in May, 1981, the Corps of Engineers turned over control of the

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[32] To a degree, this problem is alleviated by the DOT regulations. 23 C.F.R. § 771.135(g) (1981) states in relevant part:

> Designations of park and recreation lands . . . are sometimes made and determinations of significance changed late in the development of a proposed action. [A]n action may proceed without consideration under section 4(f) if the property interest in the section 4(f) type lands was acquired for transportation purposes prior to the designation or change in the determination of significance and if an adequate effort was made to identify properties protected by section 4(f) prior to project approval.

The earlier version of this regulation, 23 C.F.R. § 771.19(g) (1980), was similarly, although less restrictively worded.

park property to the City and County of Honolulu; (4) coordination of the 4(f) statement occurred prior to May, 1981; (5) the 4(f) statement was coordinated with the City and County of Honolulu, and not with the Corps of Engineers; (6) throughout the relevant period, the City and County of Honolulu has held fee title to the Park property; and (7) the City and County of Honolulu presently operates and manages the Park.

The legal issues are: (1) whether defendants were required to coordinate the 4(f) statement with the Corps of Engineers; and (2) if so, whether the violation may be excused by a showing of good faith and lack of prejudicial effect.

23 C.F.R. § 771.19(g)(1) (1980) requires that "[t]he section 4(f) involvement must be coordinated with the agency having jurisdiction over the 4(f) lands." Plaintiffs contend that the Corps of Engineers had either exclusive or joint jurisdiction over the Ho'omaluhia property while the 4(f) statement was being prepared. Defendants' submit alternatively that (1) as fee owner and ultimate manager and operator of the Park, the City and County was the *sole* agency with jurisdiction over the property; or that (2) since the regulation only refers to coordination with *the* agency having jurisdiction over the property, it was reasonable for them to coordinate the 4(f) statement with only the *primary* agency having jurisdiction, the City and County.

The Corps of Engineers developed the park pursuant to a contract with the City and County of Honolulu. Although the Corps of Engineers handled the design and construction work for the project, the City and County held ultimate control, as evidenced by their successive decisions to enlarge the project. Indeed, it was the City and County's decision to extend the Park boundaries to the edge of the H-3 right-of-way that triggered the protections of section

4(f). Clearly, the City and County was "the agency having jurisdiction" of the property, and coordination of the 4(f) statement with them was therefore proper.[33]

4. *Circulation.*

The issues raised by this cause of action are (1) whether the applicable regulations permitted Defendants to circulate the Ho'omaluhia 4(f) statement separately from the NHV-SEIS; and (2) if so, whether the 4(f) statement should have been circulated in the form and manner of a supplemental EIS.

Under ordinary circumstances, a 4(f) statement will be prepared and circulated with the corresponding project EIS. However, 23 C.F.R. § 771.19(g)(8)(i) (1980) provides for separate circulation of the 4(f) information when "[t]he section 4(f) area is designated after the . . . final EIS is processed."

Since the final Moanalua EIS was approved in 1974 and it was not determined that a 4(f) statement was required for Ho'omaluhia Park until 1978, it follows that separate circulation of the 4(f) statement was proper.

23 C.F.R. § 771.19(g)(8) does not specify the manner in which a separate 4(f) statement is to be circulated. Defendants contend that since the final 4(f) statement was processed in conjunction with the Final NHV-SEIS, then either as a matter of law or as a reasonable interpretation of the applicable regulations, it was sufficient that the 4(f) statement was only circulated to the agencies with whom the FHWA was required to coordinate preparation of the statement.

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[33] It cannot be disputed that the City and County presently has sole jurisdiction over the Park. Thus, even if defendants should have coordinated the 4(f) statement with the Corps of Engineers, Plaintiffs would be without a remedy, since the proper agency for coordination is the City and County.

Defendants' contention is not without merit. However, where, . . here, a project's involvement with 4(f) lands is sufficient to constitute "new and significant information" requiring the preparation of a supplemental EIS, *see* discussion under part V.C.3., *supra,* the 4(f) statement must be circulated as a supplemental EIS. This manner of circulation is clearly contemplated by the regulations. *See* 23 C.F.R. § 771.19(g)(5) (1980).

5. *Adequacy.*

Plaintiffs contend that the Ho'omaluhia 4(f) statement is inadequate because it fails to contain all of the information required by 23 C.F.R. § 771.19(i) (1980). The forty-second cause of action recites a litany of items which allegedly are not addressed by the 4(f) statement.

It is true that the 4(f) statement could have contained more information. However, the same can be said of any environmental document. Further, much of the omitted information will only be available once the design of the highway is finalized. Accordingly, I find that the Ho'omaluhia 4(f) statement contains sufficient information to comply with 23 C.F.R. § 771.19(i).

The thirty-eighth cause of action alleges that the Ho'omaluhia 4(f) statement is inadequate because it fails to sufficiently address non-highway alternatives to the construction of H-3. This contention is without merit. A 4(f) statement need not reiterate in detail the reasons why a highway is necessary. As is the case here, it is sufficient that the non-highway (no-build) alternatives are adequately addressed in the EIS or other documents considered by the Secretary.

6. *Approval.*

The thirty-seventh cause of action is based upon the assumption that the 4(f) statement was invalid for failure

to contain sufficient information regarding non-highway alternatives. As discussed above, the 4(f) statement sufficiently addressed the no-build alternative. At trial, Defendants offered evidence that in reaching his decision, the Secretary considered, *inter alia,* (1) the Ho'omaluhia Park 4(f) Statement; (2) Vol. I of the 1972 EIS; Vol. I of the NHV-SEIS; and the FHWA Region 9 Staff Analysis. It thus cannot be concluded that the Secretary's decision was based upon inadequate information.

7. Feasible and Prudent Alternatives.

The forty-third through forty-sixth causes of action challenge the correctness of the Secretary's determination that no feasible and prudent alternative exists to the use of Ho'omaluhia Park.

It should be recalled that the two elements of the 4(f) statutes are that: (1) parklands cannot be used unless all alternatives to their use are infeasible and imprudent; and (2) if parklands must be used, the Secretary must select the feasible and prudent alternative which minimizes harm to the park.

An alternative route which does not use the park cannot be found to be imprudent unless there are truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reaches extraordinary magnitudes. *Id.* at 412, 91 S.Ct. at 821; *Louisiana Environmental Society, Inc. v. Coleman,* 537 F.2d 79, 84 (5th Cir. 1979).

An alternative route which uses the park may be rejected if it is infeasible or imprudent or does not minimize harm to the park. Two separate reasoning processes are involved here:

> A route may be rejected because it does not minimize harm only for reasons relevant to the quantum of harm

> which will be done to the recreational area. If it does minimize harm, a route may be rejected only for truly unusual factors other than its effect upon the recreational area.

Id. at 86.

The Ho'omaluhia Park 4(f) statement considered five alternatives to the recommended alignment for the portion of H-3 in the vicinity of Ho'omaluhia Park: (1) Mauka Realignment (Scheme A); (2) Makai Realignment (Scheme B); (3) Partial Depressed Section; (4) Viaduct Section; and (5) No-Build. Of these, the Makai Realignment, Partially Depressed Section, and No-Build alternatives would not have any impact upon Ho'omaluhia Park.[34] Plaintiffs assert that the Mauka Realignment, Makai Realignment, and No-Build alternative are feasible and prudent alternatives to the recommended alignment.

For the Mauka Realignment, the highway would be realigned approximately 500 feet away from the present boundary of Ho'omaluhia Park toward the mountain (mauka direction). The location of the Kaneohe and Halekou interchanges would be the same as in the recommended alignment. Due to the topography of the area, the roadway would be approximately 100 feet higher than in the recommended alignment. This alternative was rejected because:

> [I]t would negate the originally intended purpose of the common boundary to eliminate the urbanization of land between the park and H-3. To avoid urbanization of the resulting 92-acre tract, it is likely that

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[34] The partially depressed section (partial cut and cover subalternative) would have cost approximately $66 million more than the recommended alignment. The Secretary could reasonably have believed this to be a cost of extraordinary magnitude. Plaintiffs do not contend that this alterntive is prudent.

> the State may be required to purchase the land for inclusion in the park or the land may be purchased by the city or county. The result would again be a common boundary of the park and H-3 causing a "constructive use" Section 4(f) determination. In addition, it would require additional construction costs (approximately $6 million), cause increased noise above the ambient levels within the park because of the physical relationship of the highway and park elevations, be more visible from the park, take additional lands out of banana production, and move the highway closer to the Koolau Pali Natural Landmark.

Ho'omaluhia Park Section 4(f) Determination at 3.

For the Makai Realignment, the highway would be realigned makai, or to the ocean side, of Ho'omaluhia Park. It would follow the existing alignment of Likelike Highway and Kamehameha Highway on the viaduct structure from the Kaneohe Interchange to the Halekou Interchange. This alternative was rejected because:

> [I]t would require the dislocation of one church, four businesses and 31 residences adjacent to Likelike and Kamehameha Highways; increase noise, air quality and visual impacts to residences in the general vicinity; require additional costs due to the need for the viaduct structure ($42 million additional); and require construction to lesser design geometric standards.

Id. at 3.

The described no-build alternative considered the effect of not constructing H-3 at all. This alternative was rejected because a no-build decision would:

> [R]esult in additional traffic congestion and increased delays experienced by windward commuters. Likewise, the increased safety hazards on Likelike and Pali

> Highways would directly affect Kalihi Valley and Nuuanu Valley residents. The costs of providing increased bus service which will not effectively reduce the congestion on the existing highways have been documented in the supplement to the Interstate H-3 EIS.

At trial, plaintiffs suggested that another "no-build" alternative would be to not construct the portion of H-3 between the Kaneohe and Halekou interchanges. Defendants established that this alternative was essentially the same as the Makai realignment.

The final alternative suggested by plaintiffs is the so-called "direct line" realignment. This alternative was created by drawing a straight line from H-3 near Hospital Rock to Kamehameha Highway near Kaneohe School, totally ignoring considerations of traffic flow, safety and terrain. Plaintiffs did not introduce any evidence which suggested that this alternative might be viable. Defendants testified that due to the terrain of the area, such an alignment would require a viaduct structure between 100 and 200 feet high. It is obvious that even plaintiffs do not seriously believe that this alternative is feasible *or* prudent. Accordingly, further consideration of this alignment is unnecessary.

With respect to the first part of the 4(f) inquiry, I find that the Secretary reasonably believed that there are no feasible and prudent alternatives to the use of Ho'omaluhia Park.

As discussed earlier, defendants have sufficiently established the need for the highway. Rejection of the no-build alternative was thus reasonable.

The Makai Realignment was also properly rejected. Contrary to plaintiffs' contention, community impacts may be considered in determining the prudence of an alterna-

tive. While the displacements resulting from the Makai Realignment are not, by themselves, sufficient reason to justify the use of parkland, I find that the Secretary could reasonably have believed that the sum of the factors listed rendered this alternative imprudent. In particular, the Makai Realignment would necessitate reducing design speeds on the through route from 55 MPH to 30 MPH and require an unusually complex and unsafe ramp configuration. This is not to say that the Secretary is permitted to weigh the detriment resulting from the destruction of parkland against the cost of other routes, safety considerations and other factors. Such a balancing of interests is expressly prohibited by *Overton Park*. However, *Overton Park* does not bar considering whether all of the difficulties posed by an alternative route, taken together, render that alternative imprudent.

Since it appears that there are no feasible and prudent alternatives to the use of Ho'omaluhia Park, the remaining issue is whether the recommended alignment minimizes harm to the park.

Rejection of the Mauka Realignment was proper only if (1) it was not feasible and prudent, or (2) if it does not minimize harm. I find that there is insufficient information in the record to support rejection on either of these grounds.

The possibility that the buffer zone between the highway and the park may be added to the park, again creating a constructive use, is a legitimate consideration in determining the prudence of this alternative, although in this matter, it is not a sufficient reason for rejection. As noted above, the park has expanded to meet the boundary of the project right-of-way. This situation was probably not contemplated by either the drafters of the 4(f) statutes, or the Court in *Overton Park*, which involved the proposed construction of a freeway *through* an important urban

park. The removal of land from banana production is also a permissible consideration, but not determinative.

On the other hand, the 4(f) statement does not demonstrate that moving the freeway closer to the Koolau Pali Natural Landmark will have any adverse effects. Further, an increase in construction costs of $6 million is probably not a cost of "extraordinary magnitude". Finally, the fact that park noise levels will be higher with the highway than without it is irrelevant in determining the prudence of an alternative. I conclude that the Secretary could not have reasonably determined, on the basis of the information before him at the time, that the Mauka Realignment was not "feasible and prudent".

I conclude that the Secretary properly found that there are no feasible and prudent alternatives to the use of Ho'omaluhia Park. However, the Ho'omaluhia Park 4(f) determination fails to establish that the Secretary selected the feasible and prudent alternative which minimizes harm to the park. Although it is possible that because of its elevation the Mauka Realignment will have a greater visual impact upon the park than will the recommended alignment, the 4(f) statement does not adequately support the assertion that it would not minimize total harm to the park. The Secretary's 4(f) determination must therefore be set aside.

8. *Planning to Minimize Harm.*

The forty-first cause of action alleges that:

> 508. The Ho'omaluhia Park statement is deficient and fails to comply with the requirements of [23 C.F.R. § 771.19(k) (1980)] in that the 4(f) statement does not contain the *best available information* on possible measures to minimize harm from H-3 to Ho'omaluhia Park both during and after construction. [emphasis in original]

Complaint ¶ 508 at 108.

Except to the extent that the 4(f) statement fails to support the determination that the Recommended Alignment is a harm-minimizing route, I find that the information contained in the 4(f) statement is sufficient to meet the requirements of the cited regulation. More specific planning of mitigation measures will not be possible until the project reaches the final design phase.

J. Section 4(f)—Pali Golf Course.

In 1974, I held that the Secretary had properly made the 4(f) determination for the use of Pali Golf Course land. *Stop H-3 Association v. Brinegar,* 389 F.Supp. at 1116. Pursuant to the instructions of the Ninth Circuit, I now reconsider that decision.

Pali Golf Course is a 220 acre, 18 hole golf course located at the foot of the Nuuanu Pali Lookout. It is considered one of the most challenging public courses on the island and is heavily used. The northeast side of the golf course borders on Kamehameha Highway.

As presently planned, the SE ramp of the Halekou interchange and the acceleration lane connecting the SE ramp with Kamehameha Highway will necessitate the acquisition of approximately four acres of golf course land at the northwest end of the course. Much of the land to be acquired is subject to periodic flooding and is considered surplusage to the needs of the course. The Pali Golf 4(f) statement described and discussed three alternatives to the recommended action, and recommended that they be rejected, as follows:

> Alternate 1—shifting the Halekou Interchange northerly into Hawaiian Electric Company's Koolau Substation. This alternate was rejected because it would involve costly adjustments to electrical facilities, such as steel towers and high-tension lines. Such a shift would also encroach a great deal more into Ha-

waiian Memorial Park. Where our recommended location involves unused property on a slope, a northerly shift would run the highway through developed portions of the cemetery. It should also be noted that construction is progressing on the segment of H-3 immediately to the east of Halekou interchange, and any extensive realignment to Halekou Interchange will necessitate construction changes. As mentioned before, the affected golf course properties are presently unused, and realignment of Halekou Interchange will not provide any benefit to the golf course.

Alternate 2—revising the interchange geometrics to provide a loop off-ramp directly opposite the golf course on Hawaii Loa property. . . . Such an arrangement will be more costly by approximately $145,000 and constitute a much greater encroachment into Hawaii Loa College. This proposal is also objectionable from an operational standpoint because it would introduce an undesirable weaving section to Kamehameha Highway.

Alternate 3—providing a T-intersection where the SE and SW Ramps meet Kamehameha Highway. This proposal has the advantage of eliminating the acceleration land onto Kamehameha Highway, thereby making the acquisition of golf course land along the Kamehameha Highway frontage unnecessary. However, this alternate is operationally unacceptable because the T-intersection will not have the capacity for the projected 800 vehicles per hour of P.M. traffic desiring to make a right turn onto Kamehameha Highway.

Pali Golf Course 4(f) statement at 5-6.

I find that the Secretary reasonably rejected alternates one and three as not feasible and prudent. It is apparent that Alternate 1, the northward shift of the interchange,

would increase the project's impacts upon Ho'omaluhia Park. Thus, even if I did find that the reasons stated for the rejection of this proposal were inadequate, I would conclude that this alterantive was not feasible and prudent. Moreover, I find that encroachment into the developed portions of Hawaiian Memorial Park is of sufficient importance that rejection on this ground alone would have been reasonable. With respect to Alternative 3, I find that the Secretary had enough information before him to conclude that a T-intersection would be operationally unacceptable.

The Pali Golf Course 4(f) statement fails to support the rejection of Alternate 2, revised interchange geometrics. $145,000 is not a cost of extraordinary magnitude, especially in comparison to a total project cost of over $386 million. While it may indeed be regrettable that this alternative will require the taking of property from Hawaii Loa College, there has been no evidence that this taking would entail a disruption of sufficient magnitude to render the alternative imprudent. Finally, there has been no evidence that to "introduce an undesirable weaving section to Kamehameha Highway" is an unusual factor justifying rejection of the alternative. Even taking all three factors together, I find that on the basis of the record before me, the Secretary could not have reasonably believed that this alternative is imprudent.

As with Ho'omaluhia Park, the inquiry does not end with the determination that there are no feasible alternatives to the use of the 4(f) property. The Secretary must select the alternative which minimizes harm to the park. On the basis of the record before me, I cannot conclude that this has been done. The Pali Golf Course 4(f) statement does not adequately describe the relative impacts of the different alternatives upon the Golf Course. Indeed, the statement fails to even disclose the relative amounts of 4(f) land required. I conclude that the Secretary's 4(f)

determination for the Pali Golf Course must be set aside.[35, 36]

VI. SUMMARY.

A brief summary of the disposition of the major issues of this case is in order. I find that the 1972 EIS and 1973 Preface, *i.e.*, the Moanalua Valley EIS, complied with the requirements of NEPA, the CEQ Guidelines and the DOT Regulations, and were properly approved. Thus, as of the end of the 1974 trial of this matter, the project had a valid EIS. Defendants were required to prepare a supplemental EIS to reflect the realignment of the project through North Halawa Valley. This has been done. The NHV-SEIS was properly prepared and circulated, and adequately discusses the project's impact upon North Halawa Valley. As a whole, the EIS for the project sufficiently addresses the project's socio-economic impacts and relationship to the Oahu General Plan. However, defendants have failed to prepare a further supplemental EIS which reflects the new and significant information (such as the H-3/OMEGA Collocation studies, the FHWA Region 9 Staff Analysis and the highway's 4(f) involvement with Ho'omaluhia Park), which has arisen since the draft NHV-SEIS was circulated.

Defendants properly held combined location and design hearings, timely filed the required study reports, and complied with the Coastal Zone Management Act and OMB

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[35] I do not mean to imply that the Secretary may not reject Alternate 2. I only find that the record contains insufficient information to support such a conclusion.

[36] Because the Pali Golf Course 4(f) statement was prepared and originally approved prior to the adoption of the original DOT 4(f) regulations, 23 C.F.R. § 771.19 (1974), the statement need not comply with the circulation and content requirements of the regulations.

Circular A-95 coordination requirements. Defendants have also met their responsibilities with respect to the Federal and State Endangered Species Acts.

The protections of section 4(f) apply to Ho'omaluhia Park. The defendants properly coordinated and prepared the Ho'omaluhia Park 4(f) statement, but failed to properly circulate it. The 4(f) statement contains sufficient information to comply with 23 C.F.R. § 771.19(i) and (k) (1980), and adequately considers non-highway alternatives. The Secretary properly concluded that no feasible and prudent alternatives exist to the use of the park. However, the 4(f) statement does not adequately support the finding that all possible measures have been taken to minimize harm to the park. The Secretary's determination is thus invalid.

The Secretary's Pali Golf Course 4(f) determination is invalid because the record does not adequately support the conclusion that all possible measures have been taken to minimize harm to the golf course.

Because the defendants failed to further supplement the EIS, and because the Secretary's Pali Golf Course and Ho'omaluhia Park 4(f) determinations were invalid, I must set aside the Secretary's grant of location and design approval as an action taken without observance of procedure required by law. Administrative Procedure Act, 5 U.S.C. § 706(2)(D) (1977). *See Save Lake Washington v. Frank,* 641 F.2d at 1334. Since the most recent location and design hearings were held more than three years ago, defendants must again hold such hearings before location and design approval may be validly granted. *See* 23 C.F.R. §§ 790.5(e), (f).

VII. RELIEF.

A court of equity has the power to terminate or modify any injunctions that it has imposed. The original injunc-

tions in this matter are nine and ten years old. I find that circumstances have changed sufficiently to justify terminating those injunctions and ordering new relief. At present, there are no outstanding construction contracts for the project. Indeed, even if I were to give the "all clear" today, actual construction would not begin for at least twelve months. *See* Location/Design Study Report at 12. Thus, little, if any, harm to the public will result if the injunctions are lifted. Further, I do not share the opinion of many freeway opponents that Federal and state highway department officials are evil people intent on ignoring the law. As stated in *Overton Park,* the decision of the Secretary is entitled to a presumption of regularity. *See id.* at 415, 91 S.Ct. at 823. To require the defendants to receive court approval before proceeding would improperly shift this presumption. Although it is certainly possible that defendants may fail to comply with their statutory responsibilities at some point in the future, a determination whether an injunction should issue should be made at that time. Accordingly,

(1) I hereby set aside the injunctions presently in force.

(2) I hereby deny Defendants' Motion for Reconsideration.

(3) I hereby set aside the Secretary's grant of location and design approval for the project.

(4) Defendants failure to prepare and circulate a supplemental EIS which reflects the project's Ho'omaluhia Park 4(f) involvement and the information contained in the H-3/OMEGA Collocation Studies and FHWA Region 9 Staff Analysis is a violation of NEPA, 40 C.F.R. § 1502.9 (c)(4) (1980), and 23 C.F.R. § 771.15 (1980). A supplemental EIS addressing these issues may include other studies, such as those contained in Vol. VI of the NHV-SEIS, and other information. Further, the NHV-SEIS, Ho'omaluhia Park 4(f) statement and Region 9 Staff

Analysis may be used as a basis for the draft of this document. However, the role of consultants in the further development of the draft supplemental EIS is limited by 23 C.F.R. § 771.109(c)(4) (1981).

(5) I hereby set aside the Secretary's Ho'omaluhia Park 4(f) determination. The Ho'omaluhia Park 4(f) statement does not sufficiently discuss the relative impacts of the Recommended Alignment and the Mauka Realignment upon the park. A revised 4(f) statement may reflect additional information about the park which has become available since the original statement was filed, and further discuss alternatives other than the Mauka Realignment. After the revised statement has been circulated and processed, a new 4(f) determination for Ho'omaluhia Park will be made by the Secretary.

(6) I hereby remand the Pali Golf Course 4(f) determination to the Secretary for further documentation that no feasible and prudent alternatives exist to the use of the golf course lands and all possible measures to minimize harm to the golf course have been taken.

The above constitute the findings of fact and conclusions of law required by Fed.R.Civ.P. 52.

SO ORDERED.

MOTION FILED
FEB 22 1985

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No. 84-1278

In The

Supreme Court of the United States

October Term, 1984

WAYNE J. YAMASAKI,
Director, Hawaii Department of Transportation,

Petitioner,

v.

STOP H-3 ASSOCIATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF COMMITTEE FOR H-3 AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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This motion for leave to file the annexed brief amicus curiae on behalf of the Committee for H-3 and Pacific Legal Foundation (PLF) as amici in support of a petition for writ of certiorari is respectfully made pursuant to Rule 42 of the Supreme Court rules. Consent to the filing of this brief has been obtained from counsel for all parties with the exception of counsel for respondents, Stop H-3 Association, Life of the Land, and Hui Malama Aina O Ko'Olau, and such consents have been lodged with the clerk of this Court.

The Committee for H-3 is an unincorporated organization consisting of citizens of the State of Hawaii and residents of the island of Oahu who desire access to a safe, cost-effective interstate highway. The Committee for H-3 has approximately one hundred members and a seven-person steering committee that has authorized participation as amicus in this case.

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for Pacific Legal Foundation is set by a 20-member Board of Trustees. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

Amici consider this case to be of special significance in that it raises the issue of proper scope of review of administrative agency decisions. Particularly, the decision of the Court of Appeals for which review is sought raises the question whether under the Administrative Procedure Act's arbitrary and capricious standard of review, the administrator is required to support a decision with clear and convincing evidence.

Congress has delegated decisional prerogatives to numerous administrative agencies and established standards of judicial review over the exercise of administrative discretion. As a public interest law firm, PLF has an interest in the preservation of proper administrative and judicial functions, so that congressional objectives designed to benefit the public are achieved in the most competent and efficient manner.

The Secretary of Transportation concluded that the community disruption, cost, and safety risks that the residents of Oahu would have to bear made alternatives to H-3's minimal use of parkland imprudent. The members of the Committee for H-3, as residents of the island of Oahu, therefore have a direct interest not before represented, in having the Ninth Circuit Court of Appeals review the Secretary of Transportation's conclusion under the proper judicial standard.

For these reasons, PLF and the Committee for H-3 request that this motion to file the annexed brief amicus curiae be granted.

DATED: February 21, 1985.

Respectfully submitted,

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INTEREST OF AMICUS

The interests of amici are set forth in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is officially reported at 740 F.2d 1442.

REASONS FOR GRANTING THE WRIT

Introduction

This Court should review *Stop H-3 Association v. Dole*, 740 F.2d 1442 (9th Cir. 1984), because the Ninth Circuit Court of Appeals created and applied a hybrid standard of judicial review contrary to decisions of this Court and the Administrative Procedure Act (APA). This standard of review permits a federal court to independently weigh evidence and impose its own judgment of how many homes must be destroyed, tax dollars consumed, and lives risked before parkland can be used to complete a highway. Federal law assigns to the Secretary of Transportation (Secretary), who has the necessary resources and expertise, the responsibility to evaluate these factors and exercise her judgment in the performance of duties prescribed by statute. The supervision of this Court is needed to reestablish the boundaries of judicial review and to return to the Secretary of Transportation the power granted by Congress to strike a reasoned balance between the need for safe, cost-effective highways and the need to protect parkland.

The Court Of Appeals Reviewed The Decision Of The Secretary Of Transportation Under A Hybrid Evidentiary Standard Instead Of The Arbitrary And Capricious Standard Mandated By The Administrative Procedure Act

The Secretary of Transportation's 4(f) determination[1] is properly reviewed by a court under the standard set forth in 5 U.S.C. § 706(2)(A)-(D) (Administrative Procedure Act). *See Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 413-15 (1971). In *Overton Park,* this Court outlined the three-part inquiry that constitutes judicial review of a 4(f) determination under APA Section 706. First, the reviewing court must determine whether the Secretary acted within the scope of her authority. *Overton Park,* 401 U.S. at 415. This requires asking whether the Secretary knew that parkland could be used to build a highway only in the absence of "feasible and prudent alternatives." *See id.* at 416. Next, the court must determine whether the Secretary's actual decision is " 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Id.* at 414 (citations omitted). Finally, the court must ask "whether the Secretary's action followed the necessary procedural requirements." *Id.* at 417. The only issue amici now raise is whether the Court of Appeals reviewed the Secretary's

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[1] Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 303 (DOTA), formerly codified at 49 U.S.C. § 1653(f), prohibits the Secretary of Transportation from approving the use of federal funds to construct a highway that uses parkland unless there are no "feasible and prudent alternatives." Section 138 of the Federal-Aid Highway Act of 1966, 23 U.S.C. § 138 (FAHA), contains nearly identical language. Amici use the term "4(f)" to refer collectively to these provisions.

actual decision under the proper arbitrary and capricious standard.

The arbitrary and capricious standard does not require the Secretary's conclusions about feasibility and prudence to be supported by " 'substantial evidence.' " *Overton Park,* 401 U.S. at 414. Nor does the standard authorize a court to engage in a de novo review of the 4(f) determination. *Id.* at 415. This Court recently stated:

> "The scope of review under the 'arbitrary and capricious' standard is narrow . . . the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Manufacturers Association v. State Farm Mutual,* — U.S. —, 103 S. Ct. 2856, 2866-67 (1983) (citations omitted).

In *Stop H-3 Association v. Dole,* the Court of Appeals did not keep its review within the guidelines set forth by this Court. Instead of limiting its inquiry to whether relevant factors were considered and whether there was a clear error of judgment, the court evaluated the Secretary's 4(f) determination in light of its own independent analysis of facts in the administrative record.

A. The Secretary's 4(f) Determination Was Based on a Consideration of the Relevant Factors

The Secretary of Transportation concluded that there is no feasible and prudent alternative to the constructive use of land from Ho'omaluhia Park to complete the H-3 project. *See* Ho'omaluhia Park 4(f) Statement at 5.

This conclusion was based on a consideration of the community disruption, increased cost, and safety risks associated with the proposed alternatives. *Id.* at 3-4. These factors were clearly "relevant" to the Secretary's decision since Congress intended DOTA and FAHA to bring about the development of safe, cost-effective highways[2] and expected the Secretary to consider community disruption.[3]

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[2] DOTA's Statement of Purpose provides in part:

> "The national objectives of general welfare, economic growth and stability, and security of the United States require the development of transportation policies and programs that contribute to providing fast, safe, efficient, and convenient transportation at the lowest cost consistent with those and other national objectives, including the efficient use and conservation of the resources of the United States." 49 U.S.C. § 101, Pub. L. No. 97-449, 96 Stat. 2414 (1983).

FAHA's Definitions and Declarations of Policy provide in part:

> "[S]ince many . . . [federal-aid] highways, or portions thereof, are in fact inadequate to meet the needs of local and interstate commerce . . . it shall be the national policy . . . to bring all of the Federal-aid systems up to standards and to increase the safety of these systems to the maximum extent." 23 U.S.C. § 101(b).

[3] H.R. Rep. No. 1584, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 3482, states in part: "In weighing alternatives for highway location . . . consideration must be given to . . . whether people will be displaced. . . ." S. Rep. No. 1340, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 3482, 3500, states in part:

> "The committee is extremely concerned that the highway program be carried out in such a manner as to reduce in all instances the harsh impact on people which results from the dislocation and displacement by reason of highway construction. Therefore the use of parklands properly protected and with damage minimized by the most sophisticated construction techniques is to be preferred to the movement of large numbers of people."

B. The Court's Inquiry Was Not Limited to Whether the Secretary Committed a Clear Error of Judgment

Once it was established that "relevant factors" were considered, the court should not have set aside the Secretary's decision unless the challenging party could demonstrate a "clear error of judgment." The Secretary's 4(f) determination should have been given a presumption of regularity. *Overton Park,* 401 U.S. at 415. The burden of proof should have been placed on the challenging plaintiff to establish that the Secretary of Transportation acted improperly in approving the use of parklands. *Monroe County Conservation Council, Inc. v. Adams,* 566 F.2d 419, 422 (2d Cir. 1977), *cert. denied,* 435 U.S. 1006 (1978).

The Court of Appeals in *Stop H-3 Association* not only failed to afford the Secretary's decision a presumption of regularity, it actually shifted the burden of proof and demanded that the Secretary support her 4(f) determination with clear and convincing evidence. Before rejecting the Secretary's conclusion that the "Makai Realignment" is not a prudent alternative, the court states that it is *"not convinced"* that the noise, air quality, and visual impacts are "exceptional." 740 F.2d at 1452 (emphasis added). Before rejecting the Secretary's conclusion that the no build option is not a prudent alternative, the court proclaims that it is not *"wholly convinced* that the record *clearly demonstrates"* that increased traffic congestion or commuter delays would be "unusual or extraordinary." 740 F.2d at 1456 (emphasis added). These statements make it clear that the court did not set aside the Secretary's decision because the challenging plaintiff established a clear error of judgment. Rather, the court

applied a hybrid evidentiary standard of review completely inconsistent with the APA and decisions of this Court.

C. The Court Refused to Defer to the Secretary's Expertise

This Court has long recognized that administrative agencies, with their specialization, insight gained through experience, and relatively flexible procedures, are better equipped than courts to collect, analyze, and act upon technical data in the furtherance of statutory objectives. *See Far East Conference v United States,* 342 U.S. 570 (1952). It is for this reason that judicial review under APA § 706 is limited. A court is authorized to carefully examine the administrative record because it

> "must understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made." *Ethyl Corp. v. Environmental Protection Agency,* 541 F.2d 1, 36 (D.C. Cir. 1976) (en banc), *cert. denied,* 426 U.S. 941.

However,

> "the court must give due deference to the agency's ability to rely on its own developed expertise. . . . [I]mmersion in the evidence is designed *solely* to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors." *Id.* (emphasis in original).

Whether a particular highway route is a "prudent alternative" to the use of parkland is precisely the kind of question an administrative agency, not a court, is best

equipped to answer. The Secretary of Transportation must assemble and interpret engineering studies, construction designs, cost estimates, population projections, etc., and then draw a conclusion, keeping the relevant statutory objectives firmly in mind. Because special expertise is essential to preserve the integrity of this process, " 'even under the exacting § 4(f) requirements, the judicial branch may not "fly speck" the Secretary's administrative record if it appears in its review, that all factors and standards were considered.' " *Louisiana Environmental Society, Inc. v. Dole,* 707 F.2d 116, 122-23, *reh'g denied,* 711 F.2d 1054 (5th Cir. 1983) (citations omitted).

In *Stop H-3 Association,* the court conceded "[w]e obviously do not possess the technical expertise of road-builders, and we should not interfere in the technical process of building roads." 740 F.2d at 1455. Yet in practice, the court refused to follow its own admonition.

D. The Court Imposed Its Own Judgment That the Levels of Community Disruption, Increased Cost, and Safety Hazards Created by Alternatives to H-3 Are Insufficient to Render Them Imprudent

In *Stop H-3 Association,* the Court of Appeals simply imposed its own judgment about how much community disruption, expense, and safety risk citizens must accept before parkland may be used to build a highway. This is an improper usurpation of an executive function that frustrates congressional objectives and may endanger lives.

In *Overton Park* this Court said that the scope of review under the arbitrary and capricious standard is "narrow" and that "[t]he court is not empowered to substitute

its judgment for that of the agency." 401 U.S. at 416. Inherent in this command is the principle that a court must affirm an administrative agency's decision with which it disagrees so long as the decision is rational and based on consideration of the relevant factors. *Ethyl Corp.*, 541 F.2d at 36. Although the court in this case purports to tie its holding to the "adequacy of the record," its real disagreement is with the substance of the Secretary's decision. This is apparent from the court's critique of the Secretary's reasons for rejecting the Makai Realignment and no build option.

The Court of Appeals concluded that the dislocation of one church, four businesses, and thirty-one residences is a disruption of "some magnitude" but is not of sufficient magnitude to render the Makai Realignment imprudent. This is a plain usurpation of agency prerogatives. In *National Wildlife Federation v. Lewis,* 519 F. Supp. 523 (D. Conn. 1981), *aff'd,* 677 F.2d 259 (2d Cir. 1982), the court reviewed a decision by the Secretary of Transportation to permit the construction of a connector in a metropolitan area. The court upheld the Secretary's choice of route and stated:

> "Highway construction in an urban setting necessarily involves disruptions. For that reason, decisions on the placement of highway construction are to be left to expert administrators, acting under applicable law with the advice and oversight of elected officials drawn from the affected communities. Congress has defined the factors which an agency must consider in reaching its decision. Once a federal court has determined that these factors have been considered and that the agency's decision is reasonable in light of the circumstances, the court's task is done; a

court is neither authorized nor well equipped to substitute its judgment for that of expert administrative agencies." *Id.* at 537.

An assessment of disruption requires an analysis of social, economic, and political dimensions of the community. In this case, the planned construction of H-3 was a coordinated effort between the Secretary of Transportation, Department of the Interior, Department of Housing and Urban Development, Department of Agriculture, State of Hawaii Department of Land and Natural Resources, and the City and County of Honolulu Department of Parks and Recreation. *See* Ho'omaluhia Park 4(f) Statement at 5. This is the kind of coordinated effort that makes a reasoned assessment of community disruption possible. The Secretary of Transportation was in the best position to determine whether the magnitude of disruption posed by an alternative made it imprudent, not the Court of Appeals.

The Court of Appeals also substituted its judgment about the kinds of cost that should be borne by taxpayers before parkland is used. The majority felt that another $42 million (1978 dollars) in the context of a $386 million (1979 dollars) project was not "extraordinary" enough to render the Makai Realignment imprudent. 740 F.2d at 1452. Again, the Secretary of Transportation who has the expertise and whose staff has been working with state and federal agencies planning H-3 for more than a decade is best equipped to assess the cost-effectiveness of a proposed alternative in light of statutory objectives.

The court's refusal to respect the judgment of the Secretary is perhaps best demonstrated by its repudiation of the Secretary's concern over safety risks posed by alternatives to H-3. The Secretary considered the "complex"

traffic movements, "undesirable curves," reduced speeds, and "confusing and unusual ramp configurations coupled with a high volume of merging, weaving traffic" to be drawbacks of the Makai Realignment. *See* Ho'omaluhia Park 4(f) Statement at 20-21. An "intolerable" increase in traffic congestion on presently existing highways is one safety risk cited in the Secretary's discussion of the no build option. *Id.* at 23. Nevertheless, the court set aside the Secretary's 4(f) determination because it drew different conclusions from technical data in the record and did not feel that the risk to human life was sufficiently high to justify the use of parkland. According to the court's interpretation of traffic and population projections, existing highways on the island of Oahu can be kept operating at peak capacities into the year 2000. 740 F.2d at 1456. The court claims that the ramp configuration of concern to the Secretary is not "per se unsafe" and that motorists who would use H-3 as proposed are accustomed to " 'substandard curves' " so one more such curve cannot be said to so disrupt the community that the use of parkland is warranted. 740 F.2d at 1454.

Congress intended the Secretary of Transportation to act diligently under DOTA and FAHA, to protect motorists using the interstate and federal-aid highway systems. FAHA declares national policy to include bringing all federal-aid systems "up to standards" and increasing the safety of these highways "to the maximum extent." 23 U.S.C. § 101(b). Congress has explicitly instructed the Secretary of Transportation to "give priority to those [federal-aid highway] projects which incorporate improved standards and features with safety benefits." 23 U.S.C. § 105(f). These statutory provisions make clear

that Congress did not intend parkland to be used only when traffic volume swells existing highways beyond absolute peak capacity. Nor did Congress intend to force citizens to make do with less than current, state of the art highway designs merely because they were unavailable in the past. Congress intended the Secretary of Transportation's decision to use parkland to be based on several considerations, including the opportunity to upgrade highway safety "to the maximum extent." The Secretary in this case has fulfilled this legislative mandate and amici urge this Court to set aside the Court of Appeals' attempt to interfere.

E. The Court's Hybrid Standard of Review, Combined with Its Elevation of the No Build Option to the Status of Formal Alternative, Imposes an Enormous New Burden on the Administrative and Judicial Process

The Court of Appeals considered it a requirement of 4(f) that not building H-3 at all be evaluated as an alternative to the use of parkland.[4] This requirement combined with the court's expanded scope of review means that a proposed highway which uses parkland will never be built with federal funds except in the unlikely event that the

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[4] Amici concur with Justice Wallace's conclusion that the court's majority "errs both in law and in not adopting a common sense approach" by assuming that not building H-3 is an alternative requiring formal consideration under DOTA § 303 and FAHA § 138. *See* 740 F.2d at 1466 (Wallace, J., concurring in part). Rather than directly address this issue, amici have chosen to discuss the effect of the court's treatment of the no build option when combined with its hybrid standard of review.

Secretary of Transportation can prove with clear and convincing evidence that *not* building it will affirmatively create disruptions of "extraordinary magnitude." To attempt to make this showing, the Secretary will have to speculate about the probable future conduct of all government agencies, groups, and individuals in the area as they face the growing inadequacy of the transportation infrastructure in the absence of the proposed project. The Secretary will have to construct hypothetical scenarios of disruption with no clear basis for the setting of assumptions.

Computer models, origin and destination data, and other tools of transportation analysis make possible a fair prediction of the effects of a proposed project. The most significant variable in such a prediction is usually the actual project, but it can be clearly defined and its parameters controlled. In simple terms, assumptions as to collateral events tend to flow from the project itself. A no build analysis, however, has no such controlling variable. Collateral events which are responses to the central project can be predicted with fair certainty, but in the absence of any central project, predictions of collateral events become wholly speculative. For example, it is possible to predict the relatively minor changes to other streets and roads in the area likely to accompany the construction of a new highway in any of its proposed configurations. Likewise, it is possible to accurately assess the effects of these changes on the disruption, cost, and safety of the proposed project as a whole.

To evaluate the effect of not building any highway at all, however, the Secretary of Transportation will have to identify which individual compensating projects are likely to be required given projected commuter demands. The Secretary will have to speculate as to when and how such

compensating projects may be put into effect, in light of the resources and preferences of all local communities involved. The final conclusion as to whether or not building the proposed highway is "prudent" would necessarily be based on a conjectural process in which many variables over which the Secretary has no control assume prominent significance. If the decision of the Ninth Circuit Court of Appeals is allowed to stand, the Secretary of Transportation will be faced with the perhaps impossible task of "clearly demonstrating" to a court with "wholly convincing" yet speculative data that any possible compensating transportation project will create a disruption of extraordinary magnitude.

The Court of Appeals has imposed an enormous new burden on the Department of Transportation to generate and analyze speculative data of questionable relevance. A burden of similar proportion is imposed on the federal courts. When consideration of speculative theories of how transportation needs might be met without the proposed project is coupled with the expanded, hybrid scope of review developed by the Ninth Circuit, federal courts will be confronted with vastly enlarged administrative records. Case loads also will increase because 4(f) determinations based on artificial scenarios can be readily challenged on the basis that "evidence" in the record is not "wholly convincing" of the hypothetical possibilities. Finally, the precedent set by the Court of Appeals will provide additional means of tactical delay to those who use legal process to extort one-sided resolutions of all conflicts

involving environmental and socioeconomic interests.[5] The 4(f) process will be transformed from a clearly focused analysis of the feasibility and prudence of certain alternatives, into an elaborate game of academic exercises in the conceivable.

———o———

CONCLUSION

The scope of review of administrative agency decisions is an important question of federal law. Because the standard adopted by the majority in the case at bar conflicts with the standard specified by this Court and the Administrative Procedure Act, amici Committee for H-3

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[5] In *South Louisiana Environmental Council, Inc. v. Sand*, 629 F.2d 1005 (5th Cir. 1980), the court noted:

> "Litigation in environmental areas may kill challenged projects by delay. Although the plaintiffs may lose on the merits, often they win as a practical matter. Attorneys fees and delay are expensive and when such costs are attributed to a project, its continuance may be no longer justified." 629 F.2d at 1014 n.9.

Like the project at issue in *South Louisiana Environmental Council, Inc.*, the H-3 project has undergone studies since its inception in the late 1960s. During the 12 years that this project has been tied up in the courts, its estimated cost of completion has ballooned from $386 million (1979 dollars) to $742 million (1982 dollars).

and Pacific Legal Foundation urge that the petition for certiorari be granted.

DATED: February, 1985.

Respectfully submitted,

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No. 84-1278

In the Supreme Court of the United States

OCTOBER TERM, 1984

WAYNE J. YAMASAKI, DIRECTOR, HAWAII DEPARTMENT OF TRANSPORTATION, PETITIONER

v.

STOP H-3 ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

The question presented is whether the court of appeals overstepped the proper bounds of judicial review in setting aside the Secretary of Transportation's determination that, for purposes of Section 4(f) of the Department of Transportation Act, which regulates use of parkland for federally-supported highways, there was no prudent alternative to routing a stretch of Interstate Highway H-3 alongside Ho'omaluhia Park.[1]

[1]Section 4(f) of the Department of Transportation Act, 49 U.S.C. 303(c), provides in pertinent part:

> The Secretary [of Transportation] may approve a transportation * * * project requiring the use of publicly owned land of a public park * * * only if —
>
> (1) there is no prudent and feasible alternative to using that land * * *.

See also the essentially identical provisions of Section 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. 138.

1. This case concerns H-3, a proposed federal Interstate Highway System project intended to link the leeward and windward sides of the island of Oahu in Hawaii. As presently designed, the highway would run alongside Ho'omaluhia Park, land subject to the provisions of Section 4(f), for approximately 1.7 miles. Reversing the district court, the court of appeals enjoined further construction pending compliance by the United States Secretary of Transportation "with section 4(f) as the statute applies to Ho'omaluhia Park" (Pet. App. 46a).[2] The Ninth Circuit held (*id.* at 13a-23a) that the administrative record did not support the Secretary's rejection of the "Makai" (*i.e.*, "toward the ocean") alternative to use of the park as "imprudent" under the strictures of Section 4(f). Further the court of appeals stated (Pet. App. 23a-29a) that the Secretary's rejection of the "alternative" of not constructing the project at all was not justified by the record of the administrative decision.[3]

2. We share the petitioner's view that, in invalidating the Secretary's determination that there is no "prudent" alternative to routing H-3 adjacent to the Ho'omaluhia Park, the court of appeals may well have exceeded the permissible scope of judicial review of Section 4(f) decisions, as reflected in *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971). While the Secretary's decision is subject to a "thorough, probing, in-depth review" (401 U.S. at 415), the reviewing court is not to substitute its judgment for that of the Secretary, and must confine its inquiry to

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[2]The opinion of the court of appeals (Pet. App. 1a-52a) is reported at 740 F.2d 1442. The opinion of the district court (Pet. App. 55a-125a) is reported at 538 F. Supp. 149.

[3]Judge Wallace filed a separate concurring opinion (Pet. App. 47a-52a). He joined in the majority's holding except for the majority's "unnecessary analysis of the No Build alternative in connection with Ho'omaluhia Park," which he viewed as incorrect dictum (*id.* at 47a-48a).

whether the decisionmaker's choice was reasonably based upon the administrative record (*id.* at 415-420). We thus believe that there is a substantial basis for petitioner's contention (Pet. 14-18) that the court of appeals has blurred the line separating proper judicial review from interference with administrative discretion and informed decisionmaking.

This case, however, provides an inappropriate vehicle for exploring and clarifying the scope and standard of judicial review of Section 4(f) determinations. The court of appeals' decision does not preclude the Secretary from reinstating his Section 4(f) determination. It merely holds that the present administrative record does not suffice to support the previous determination, and accordingly requires appropriate supplementation. The court of appeals thus emphasized (Pet. App. 23a):

> We stress that we do not find, nor is it this Court's role to find, that the Makai Realignment is *in fact* a feasible and prudent alternative. We obviously do not possess the technical expertise of roadbuilders, and we should not interfere in the technical processes of building roads. At the same time, however, it remains our solemn responsibility to insure that those with technical expertise exercise it in accordance with the laws of the United States and the public welfare. * * * The record before us simply does not demonstrate that the stringent requirements of section 4(f), as defined in *Overton Park* and its progeny, have been satisfied. Until those requirements are satisfied, we cannot allow our Nation's sacred parklands to be taken or used.[4]

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[4]In summarizing its disposition the court of appeals added (Pet. App. 29a):

> In conclusion, then, it is our view that the present record does not support a determination that the No Build alternative must be

Nor is there any reason to conclude that supplementation of the administrative record would prove a futile exercise here. The court of appeals' opinion specifically adverts to documentation that could be provided that would support what it considered to be unsubstantiated premises of the Secretary's 4(f) determination. See, *e.g.*, Pet. App. 21a-22a & n.19 (missing safety analysis of Makai alternative could readily be supplied); see also Pet. App. 27a-28a. In addition, the court of appeals declined to consider certain testimony and an affidavit pertinent to the justifiability of the Section 4(f) determination on the ground that the materials were not before the Secretary. Plainly that need not be the case in any reconsideration of the Section 4(f) determination. Thus, supplementation of the administrative record could well avert the need to clarify the scope of judicial review of Section 4(f) determinations. Accordingly, although the court of appeals' decision is inconsistent with the government's position below, we do not believe that further review is justified here.[5]

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rejected as imprudent. We emphasize that, as with the Makai Realignment, we do not hold that the No Build alternative is, in fact, reasonable and prudent. We merely hold that the record before us does not demonstrate that the stringent requirements of section 4(f) have been satisfied.

[5]Petitioner now appears to contend (Pet. 13-14) that the location of Route H-3 alongside Ho'omaluhia Park is a factor that "the Secretary could properly consider in concluding that Section 4(f) is not applicable" here (Pet. 13). This argument, or a variant thereof, evidently was rejected by the district court and apparently was not raised by petitioner in the court of appeals (see Pet. App. 6a-7a n.5). In any event, the Secretary's 4(f) determination was premised on the assumption that Section 4(f) is applicable here. (The Secretary considered the special symbiotic relationship of Ho'omaluhia Park and Route H-3 as a factor bearing upon the merits of his Section 4(f) determination.) This is accordingly an inappropriate case in which to consider petitioner's contention that the Secretary might have dispensed with compliance with Section 4(f).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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OPPOSITION

BRIEF

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No. 84-1278

In The
Supreme Court of the United States
October Term, 1984

WAYNE J. YAMASAKI,
Director, Hawaii Department of Transportation,
Petitioner,

vs.

STOP H-3 ASSOCIATION, LIFE OF THE LAND, HUI MALAMA AINA O KO'OLAU,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF STOP H-3 ASSOCIATION, LIFE OF THE LAND AND HUI MALAMA AINA O KO'OLAU IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 4(f) of the Department of Transportation Act of 1966 and Section 18 of the Federal Aid Highway Act of 1966 prohibit the use of parklands by highways unless there is no feasible and prudent alternative to such use.

1. Do these statutes apply where the boundary of a proposed four lane freeway would be coterminous with that of a 450 acre wilderness park for over half the park's perimeter and the effects of the freeway would be direct and substantial even though no parkland will be physically taken?

2. Should the highway be exempted from the operation of these statutes where although the highway and park were conceived contemporaneously, the wilderness park has become a major, functioning reality and the highway has yet to be developed?

3. Can Petitioner raise for the first time in the Supreme Court a factually disputed issue concerning the applicability of these two statutes which Petitioner failed to appeal to the Circuit Court?

PARTIES TO THIS PROCEEDING

The State defendant below was Ryokichi Higashionna as Director of the State of Hawaii Department of Transportation. He has been succeeded as Director by Wayne J. Yamasaki who is the Petitioner in this proceeding.

The Federal defendants below were Elizabeth H. Dole as Secretary of the U.S. Dept. of Transportation and Ralph Segawa as Hawaii Division Engineer, Federal Highways Administration. Ralph Segawa has since died and his successor is Heloshi Kusumoto. The Federal defendants have neither filed a Petition for a Writ of Certiorari nor joined in the Petition of the State defendants. They are therefore also Respondents in this proceeding.

Respondents Stop H-3 Association, Life of the Land, and Hui Malama Aina O Ko'olau were plaintiffs in the District Court and appellants before the Ninth Circuit Court of Appeals.

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FEDERAL STATUTES:

Section 4(f) of the Department of Transportation Act of 1966, 92 Stat. 824, 49 U.S.C. § 1653(f) [recodified as § 303], and Section 18 of the Federal-Aid Highway Act of 1968, 82 Stat. 823, 23 U.S.C. § 138 ..... *passim*

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No. 84-1278

In The

Supreme Court of the United States

October Term, 1984

WAYNE J. YAMASAKI,
Director, Hawaii Department of Transportation,
Petitioner,

vs.

STOP H-3 ASSOCIATION, LIFE OF THE LAND,
HUI MALAMA AINA O KO'OLAU,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF STOP H-3 ASSOCIATION, LIFE OF THE LAND AND HUI MALAMA AINA O KO'OLAU IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Stop H-3 Association, Life of the Land and Hui Malama Aina O Ko'olau respectfully urge this Court not to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The majority and concurring[1] opinions of the Ninth Circuit Court of Appeals issued in 1984 are reported as

[1] In its Petition, the Petitioner repeatedly mischaracterized Judge Wallace's partial concurrence as a dissenting opinion.

Stop H-3 Ass'n v. Dole, 740 F.2d 1442. Those opinions are reprinted at pp. 1a-52a of the Appendix to the Petition. The 1982 decision of the U.S. District Court for the District of Hawaii from which the appeal was taken is reported as *Stop H-3 Ass'n v. Lewis*, 538 F.Supp. 149. That opinion is reprinted at pp. 55a to 125a of the Appendix to the Petition.[2]

JURISDICTION

The basis for jurisdiction in the District Court was 28 U.S.C. Sec. 1338(a). In the Ninth Circuit Court of Appeals jurisdiction was based on 28 U.S.C. Sec. 1291 and 1292(a) (1). The Ninth Circuit Court of Appeals Opinion was issued on August 21, 1984. Petitioner's Suggestion of Appropriateness of Rehearing En Banc was unanimously denied on November 15, 1984. Petitioners have invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 4(f) of the Department of Transportation Act of 1966, as amended, 92 Stat. 824, 49 U.S.C. § 1653(f), and Section 18 of the Federal-Aid Highway Act of 1968, 82

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[2] Prior decisions in this litigation are *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434 (9th Cir. 1976), *cert. denied*, 429 U.S. 999 (1976), *Stop H-3 Ass'n v. Brinegar*, 389 F.Supp. 1102 (D.Haw. 1974), *Stop H-3 Ass'n v. Volpe*, 353 F.Supp. 14 (D.Haw. 1972), and *Stop H-3 Ass'n v. Volpe*, 349 F.Supp. 1047 (D.Haw. 1972).

Stat. 823, 23 U S.C. § 138 are virtually identical.[3] These two statutes are commonly and hereinafter referred to as the "4(f) statutes" or "section 4(f)". They provide as follows:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

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[3] 23 USC Sec. 138 was amended in 1976 to add a sentence concerning highways to and through national parks. 49 U.S.C. § 1653(f) was recently recodified without substantive change as 49 U.S.C. § 303.

STATEMENT OF THE CASE

The City and County of Honolulu is a single political entity encompassing the entire island of Oahu. Geographically, the Ko'olau Mountain range runs roughly north-south and divides Oahu into the windward (east) and leeward (west) sides. The primary urban center (Waikiki, downtown, Pearl Harbor) is located in the southern third of leeward Oahu. Two bedroom suburbs, Kailua (Kai-loo-ah) and Kaneohe (Khan-e-o-hay), are located on windward Oahu, but most of windward Oahu is rural. The primary north-south highways are Kamehameha Highway on the windward side and Interstates H-1 and H-2 on the leeward side. These two north-south highways are connected by two east-west highways through the Ko'olau mountains. The Pali (Pah-lee) Highway connects the suburb of Kailua with downtown Honolulu. About four miles north of the Pali Highway, Likelike (Leeky-leeky) Highway roughly parallels the Pali Highway and connects Kaneohe with the airport area on the leeward side. Interstate H-3 would be a spur line off of H-1 and a third trans-Koolau highway.

In 1960, as part of its statehood package, Hawaii was allotted a share of the interstate highway system mileage. Part of the mileage alloted to Hawaii was used to build Interstate Highways H-1 and H-2. The State proposes to use the rest of its interstate mileage allotment for H-3.

As planned, H-3 would connect Kaneohe Marine Corps Air Station on windward Oahu with the Pearl Harbor/Halawa area on the leeward side. By sprinkling references to these and other military installations on

Oahu as well as by using the label "defense highway" at every opportunity, Petitioners suggest by innuendo what would be false if stated directly, i.e., that H-3 is actually needed as a defense highway. Such is not the case. In September, 1981, the Department of Defense prepared its *Interstate Completion Study* which has been annually updated. The study designates on a "yes" "no" basis whether planned but unbuilt interstate segments are of importance to national defense. H-3 is designated as a highway in the "no" defense importance category.[4] Since obviously Hawaii's Interstate mileage cannot connect to the interstate highway system, H-3 is labeled a "defense highway" to secure interstate funding as a component of the Interstate and Defense Highway System.

Petitioner suggests that the unbuilt part of H-3 is a "missing link". That is not the case. It is an offshoot of H-1. Halawa Interchange (the proposed leeward terminus of H-3) was built as part of H-1 not H-3. There is a short windward segment of H-3 that was completed in 1974 which terminates at Kamehameha Highway and needs only to be linked with that highway to have independent utility.[5] Precisely because that segment would have independent utility, Stop H-3 Ass'n. voluntarily exempted that section from the injunction issued in 1972 thereby allowing it to be completed with the understanding that the State would never contend that its completion

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[4] *See,* Congressional Budget Office Study, *The Interstate Highway System: Issues and Options,* Table C-1 at page 81 (Explanatary footnotes at page 94), June 1982.

[5] Respondents have always been willing to agree to such a connection but the State has declined to do so except on its terms in order to keep the completed segment out of use to generate public pressure for completing all of H-3.

justified or compelled further construction of H-3. Petitioners have now violated that understanding.

On windward Oahu at the base of the Ko'olau Mountains about midway between the Pali and Likelike Highways lies Ho'omaluhia (ho-o-mah-loo-hee-ah) Park. H-3 is proposed to be routed through a narrow strip of undeveloped land between Ho'omaluhia Park and the almost vertical windward cliffs of the Ko'olau Range. For 1.7 miles, about half of the Park's perimeter, the highway and park boundaries would be coterminus.

Ho'omaluhia Park did not come into existence because of H-3, nor as suggested by Petitioner was it created in any sense in response to H-3. Ho'omaluhia Park began independently as a Corps of Engineers flood control project in 1966.[6] The present windward alignment for H-3 was not finally determined until 1967. The park was developed independently of H-3, however, the existence of H-3 was forced upon the park planners as a "given" by the State of Hawaii, and as a result the park planners made no attempt to extend the Park's boundaries into the proposed H-3 alignment.

Ho'omaluhia in Hawaiian means "to make a place of peace and tranquility", and its development and use has been consistent with that theme. In what is essentially an undeveloped wilderness atmosphere the City has developed nature and environmental study facilities,

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[6] The dates used, the description of Ho'omaluhia Park and the quote from the Honolulu Parks Department which follow all are taken from the Ninth Circuit Court and the District Court opinions. *See, Stop H-3 Ass'n v. Dole,* 740 F.2d 1442 at 1447-48 (9th Cir. 1984) and *Stop H-3 Ass'n v. Lewis,* 538 F.Supp. 149 at 176 (D.Haw. 1982) respectively.

camping and picnicking areas and equestrian and hiking trails. If H-3 were to be built it would be within 100, 200 and 700 feet of the three primary campgrounds, and for half its length the equestrian trail would be between 75 and 200 feet from the highway.

The Honolulu Parks Department describes Ho'omaluhia Park as follows:

> Ho'omaluhia is a program park, where all activities are directed toward the exploring, evaluating and appreciating of the natural environment and our interaction with it.
>
> Recreation at Ho'omaluhia will offer many ways to become involved in the environment, through nature walks, hiking, camping, picnicking, cloud watching and other programs to enhance environmental awareness.
>
> Variety is the key; and to ensure it, the wilderness atmosphere of quiet and solitude must be maintained.

The visual intrusion and the noise and air pollution from a major freeway immediately abutting the park would destroy the purpose for which the park was created and for which it has been operated.

This litigation has spanned 13 years. As it progressed the incumbent Secretary of Transportation has been substituted for his or her predecessor as the named Defendant. Although the Complaint has been amended from time to time and parties substituted, it remains the same case originally filed on July 19, 1972. At that time no environmental impact statement (EIS) had been prepared for H-3 as required by the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.* (NEPA). Ignoring *Arlington Coalition v. Volpe,* 458 F.2d 1323 (4th Cir. 1972), *cert. denied,* 409 U.S. 1000 (1972) and a dozen

cases with similar holdings, the State took the position that H-3 was exempt from NEPA because the State had decided to build H-3 before NEPA was enacted. At the insistence of the U.S. Attorney's office the State reluctantly abandoned that position and stipulated to the entry of an injunction in September 1972 halting all construction work (except on the short windward section previously discussed) until an EIS could be prepared and approved. The stipulated injunction was extended by the District Court in October 1972 to prohibit all design and engineering work. *Stop H-3 Ass'n v. Volpe,* 349 F.Supp. 1047 (D.Haw. 1972). In 1973 the complaint was amended to add a claim that the 4(f) statutes applied to historic Moanalua Valley, a privately owned leeward valley through which the State then proposed to route H-3. Similar to the position it took with NEPA, the State denied that the 4(f) statutes applied to Moanalua Valley in spite of the fact that the Secretary of Interior had determined the valley to be eligible for inclusion on the National Register of Historic Places. In late 1974 the State obtained approval for the EIS and moved to dissolve the injunction. After trial, on Dec. 26, 1974 the District Court filed its opinion in which it agreed with the State's position on the applicability of the 4(f) statutes to Moanalua Valley and dissolved the injunction. *Stop H-3 Ass'n v. Brinegar,* 389 F.Supp. 1102 (D.Haw. 1974).

An injunction pending appeal was refused, however, the Ninth Circuit Court expedited the appeal and immediately following oral argument reinstated the injunction. In its Opinion filed on March 8, 1976, the Ninth Circuit Court reversed the District Court and found that the 4(f) statutes did apply to Moanalua Valley. The case was

remanded and the injunctions reinstated until the Secretary complied with the 4(f) statutes with respect to Moanalua Valley. *Stop H-3 Ass'n v. Coleman,* 533 F.2d 434 (9th Cir. 1976). A Suggestion for Rehearing En Banc was denied as was the State's Petition for Writ of Certiorari. 429 U.S. 999 (1976)

Only because it had been forced to do so, the State prepared a 4(f) statement for Moanalua Valley. True to form the 4(f) statement concluded that there were no feasible and prudent alternatives to H-3's use of Moanalua Valley. That conclusion was rejected by the Secretary of U.S. Dept. of Transportation (hereinafter referred to as the "Secretary") who formally determined that on the record he could not agree that there were no prudent alternatives to the use of Moanalua Valley. Only then did the State abandon the Moanalua Valley route and shift the proposed leeward alignment two valleys northward into North Halawa Valley.

Because construction, design, and engineering of H-3 has been continuously enjoined since October 1972 (except for brief periods in 1975 and 1983), H-3 still has progressed very little. However, by 1978 Ho'omaluhia Park was a reality, a 450 acre mountain park with a 32 acre lake. It was and is, by far, the major non-beach park on Oahu, and its status as a park of local significance is firmly established.

On July 3, 1978 Stop H-3 Ass'n. filed an amended and supplemented complaint which added as a supplemental claim allegations that the 4(f) statutes applied to Ho'omaluhia Park. Once again, the State's response was to deny that the 4(f) statutes were applicable. In 1978 the Dis-

trict Court denied the State's motion to dismiss that new supplemental claim. The Court found that the direct and substantial impact of H-3 on Ho'omaluhia Park constituted a constructive use of the Park and triggered the application of the 4(f) statutes.[7] Only after the Court denied the State's motion to dismiss and rejected the State's position on 4(f) did the State grudgingly prepare a 4(f) statement for Ho'omaluhia Park.

At trial in 1981 Stop H-3 Ass'n urged that if the tests enunciated in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971) (hereinafter cited as *Overton Park*) properly were applied, on the record the Secretary could not reasonably have concluded that two of the alternatives, the "Makai Realignment" and "No Build" alternatives, both of which would avoid all use of Ho'omaluhia Park, were imprudent. Although the District Court agreed that none of the reasons advanced in the 4(f) statement individually rendered those alternatives imprudent, the District Court felt that, if the reasons were amalgamated, the Secretary could have concluded that both of those alternatives were imprudent. *Stop H-3 Ass'n v. Lewis,* 538 F.Supp. 149, 180 (D.Haw. 1982). Respondents appealed. An injunction pending appeal was denied but following oral argument on November 30, 1983 the Ninth Circuit Court reimposed the injunction.

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[7] It should be emphasized that the right of way at Ho'omaluhia Park had not yet been acquired for H-3. The U.S. Dept. of Transportation regulations themselves recognized that the 4(f) statutes applied to parks that were developed or determined to be significant later in the development of a highway where the right of way had not been acquired. 23 C.F.R. 771.19(e) (1979), 23 C.F.R. § 771.135(g) (1984).

On August 21, 1984, the Ninth Circuit Court issued its Opinion. "After a thorough, probing, and in-depth review of the administrative record, we agree with the appellants' contentions in respect to the 'Makai Realignment' alternative and the 'No Build' alternative, and, accordingly, we reverse."[8]

In his Petition, Petitioner attacks (1) the factual determination by the District Court that the freeway would constructively use Ho'omaluhia Park, (2) the well established doctrine that constructive use of a park triggers the application of the 4(f) statutes, and (3) the Ninth Circuit Court's holding that the record did not support the Secretary's finding that the two alternatives which would avoid all use of Ho'omauhia Park were not prudent.

REASONS FOR DENYING THE WRIT

I. This Case Arises Out of a Unique and Complex Set of Facts Never Likely to Be Duplicated.

It should be readily apparent from the foregoing Statement of the Case, that this litigation arises out of a very unique and complex set of facts and has a convoluted procedural history which is never likely to be encountered again. A review of the facts of every reported decision in which the 4(f) statutes have played a part reveals no similar factual situation or procedural history. It is unclear whether the Petitioner is urging the abolition of the

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[8] *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1449 (9th Cir. 1984) (footnote omitted).

constructive use doctrine[9] or that H-3 should be exempted from the 4(f) statutes because H-3 and the Park were conceived at about the same time and the planning for each acknowledged the potential existence of the other.[10] There seems to be little utility in this Court passing on an issue when either way the issue is decided it would only affect cases where park and highway planning start at about the same time, but the park is developed and becomes operational years before even the right of way is acquired for the highway. Petitioner would have the Court ignore the trial court's factual determination that the substantial, direct and adverse impacts on the park if H-3 were to be built would constitute a "use" of the park. If H-3 had been built before the Park, then the 4(f) statutes would not have applied to begin with. When the reverse situation is present the plain wording of the 4(f) statutes require that they be applied. Even though the Park is a present reality and the future of the highway is still in doubt, Petitioner wants it both ways and asks for an exemption for H-3 from the 4(f) statutes for no other reason than that the Park and highway planners acknowledged the existence of both projects. Petitioner cites no authority for his position which is on point, because there is none. The absence of authority to support Petitioner's position is no doubt a reflection of the unique set of facts presented by this case. The truth is that when

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9 This seems to be what the Petitioner is driving at in his first "Question Presented" and the discussion under the Petition's first "Reason for Granting the Writ."

10 Petitioner seems also to taking this position in his first "Question Presented", the first paragraph of the Petitioner's first "Reason for Granting the Writ" and in part C of Petitioner's "Statement of the Case".

the state selected the route for H-3 it ignored the 4(f) statutes. Now the State asks to be exempted from the consequences of its error.

II. The Decision by the Ninth Circuit Is in Accord with the Decisions of Every Court Which Has Passed on the Question of Constructive Use.

The doctrine of constructive use is based on a simple reality, " . . . a project which respects a park's territorial integrity may still, by means of noise, air pollution and general unsightliness, dissipate its aesthetic value, crush its wildlife, defoliate its vegetation, and 'take it' in every practical sense." *D.C. Federation of Civic Associations v. Volpe,* 459 F.2d 1231, 1239 (D.C.Cir. 1971) *cert. denied,* 405 U.S. 1030 (1972) (footnote omitted). The opening words of the 4(f) statutes themselves support a broad interpretation of the term "use". "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands. . ." Faced with this clear expression of Congressional intent[11] the Ninth Circuit as early as 1972 decided that "the word 'use' is to be construed broadly. . ." in 4(f) cases. *Brooks v. Volpe,* 460 F.2d 1193, 1194 (9th Cir. 1972). In that case, the Court required that the "encirclement of Denny Creek campground by the challenged freeway be recognized as a use of that campground" within the meaning of the 4(f) statutes.

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[11] It should be kept in mind that the identically worded statute was enacted not once, but *twice,* once in 1966 and again in 1968. Congress had a chance to decide if it really meant what it said the first time and decided that it did. The legislative history of the 4(f) statutes is discussed extensively in Gray, *Section 4(f) of the Department of Transportation Act,* 32 Md.L.Rev. 327 (1973).

Ten years later in *Adler v. Lewis,* 675 F.2d 1085, 1092 (9th Cir. 1982) the Ninth Circuit Court reaffirmed its prior holding:

> The term 'use' is to be construed broadly, not limited to the concept of a physical taking, but includes areas that are significantly, adversely affected by the project. Department of Transportation Order No. 5610.1A, para. 9(c)(1), 36 Fed.Reg. 23681 (1971). Even off-site activities are governed by § 4(f) if they could create sufficiently serious impacts that would substantially impair the value of the site in terms of its prior significance and enjoyment *D.C. Federation of Civic Associations v. Volpe,* 459 F.2d 1231, 1239 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1030, 92 S.Ct. 1290, 31 L.Ed.2d 489 (1972).

In constructive use cases it is plaintiff's burden to establish that the highway would significantly impair the uses for which the park was designed. *Citizen Advocates for Responsible Expansion v. Dole,* 586 F.Supp. 1094, 1103 (N.D. Tex. 1984). Respondents twice met that factual burden in the District Court. The District Court's conclusion that H-3 would constructively use the Park because of the significant impairment of the uses for which the Park was designed went unchallenged on appeal.

Even the cases cited by Petitioner acknowledge, accept, agree with, and apply the constructive use doctrine. In *Falls Road Impact Committee v. Dole,* 581 F.Supp. 678 (E.D. Wis. 1984) *aff'd* 737 F.2d 1476 (7th Cir. 1984), the court applied the constructive use doctrine and concluded that the use of the park was not significant enough to constitute a constructive taking. In reaching its decision the Court by specific reference made it clear that if it had been a case of a major freeway being built next to a park, its decision might have been different. *Id.,* 581 F.Supp. at

693. Likewise, in *Arkansas Community Org, for Reform Now (A.C.O.R.N.) v. Brinegar,* 398 F.Supp. 685 (E.D.Ark. 1975), *aff'd, A.C.O.R.N. v. Coleman,* 531 F.2d 864 (8th Cir. 1976) upon which Petitioner relies heavily, the Court specifically acknowledged *and applied* the constructive use doctrine. "If the park is a public park, it simply cannot be used actually or *constructively* for federal highway purposes until a proper statutory finding has been made." *A.C.O.R.N. v. Brinegar,* 398 F.Supp. at 692 (emphasis added). In *A.C.O.R.N.,* on the facts the Court found that because the park was an urban park bounded by heavily trafficked streets and containing a theater, restaurant, museum and art center, the increase in noise and air pollution would not substantially affect park users, and therefore there was no constructive use. In this regard the Court's approach in A.C.O.R.N. is in complete accord with that used by the Hawaii District Court.

"Constructive use is not an easily defined concept. The fact that traffic noise can be heard or that a highway can be seen from a park does not necessarily mean that the park is being 'used' by the highway. The degree or existence of constructive use depends upon both the nature of the park and the degree of impacts from the highway." *Stop H-3 Ass'n v. Lewis,* 538 F.Supp. 149, 176-77 (D.Haw. 1982). From the just quoted language, it is clear that the Hawaii District Court understands that the impacts of the highway have to be substantial to constitute constructive use. It had the same understanding when it entered its Order on Nov. 21, 1978 finding that the substantial impacts of H-3 on Ho'omaluhia Park were ". . . sufficient to make the 'constructive use' doctrine of *Brooks v. Volpe,* 460 F.2d 1193 (9th Cir. 1972) applicable. . ." Such constructive use,

the Court went on to hold, triggered the application of the 4(f) statutes. *Citizens to Preserve Wilderness Park v. Adams,* 543 F.Supp. 21 (D.Neb. 1981), *aff'd.* 685 F.2d 438 (8th Cir. 1982), another case relied on by Petitioner, illustrates that the use of the constructive use doctrine is a two way street. There the Court upheld the Secretary's determination that there were no prudent alternatives because all alternatives involved park use. It did so by pointing out that the one alternative which would not physically take parklands nevertheless would impact on the park sufficiently to constitute constructive use.

It is serious misreading of *Nashvillians Against I-440 v. Lewis,* 524 F.Supp. 962 (D.Tenn. 1981) for Petitioner to suggest that the Court . . . "found that there is no such thing as constructive use." (Petition p. 14). On the contrary, the District Court stated that it personally was unconvinced that section 4(f) supported a constructive use theory *as applied to urban historic properties.* Nevertheless the Court indicated that as to one such property (Granny White Pike), there might be an obligation to prepare a 4(f) statement. Moreover that Court went on to say: "Most of the cases cited by plaintiffs in support of the 'constructive use' theory deal with parks and recreation areas or wilderness areas, rather than historic properties. (Footnote omitted). In those cases, the purposes for which such properties are protected were threatened by the 'use.'" *Id.,* 524 F.Supp. at 976. It was precisely because H-3 threatens the purposes for which Ho'omaluhia Park was created that both the District Court and the Ninth Circuit Court found such threatened injury to be constructive use. Whether or not the two projects were conceived contemporaneously is irrelevant.

There are numerous cases involving freeways next to parks which are directly on point. In *Citizens for Mass Transit Against Freeways v. Brinegar,* 357 F.Supp. 1269, 1280 (D.Ariz. 1973) the court stated: "The fact that the remainder of Barney Park is immediately adjacent to the freeway route is enough to require a 4(f) statement. . . ." Also on point is *Monroe County Conservation Council v. Adams,* 566 F.2d 419 (2nd Cir. 1977), *cert. denied* 435 U.S. 1006 (1977), where the Court found that the impact of a major freeway adjacent to a park was so great that it constituted a use under the 4(f) statutes. *Id.,* 566 F.2d at 424. Similarly in *Conservation Society v. Secretary of Transportation,* 362 F.Supp. 627 (D.Vt. 1973) *aff'd* 508 F.2d 927 (2d Cir. 1974), the Court found that a four lane highway project bordering on a wilderness area ". . . would constitute the 'use' of that land within the prohibitory meaning of § 4(f) . . ." *Id.,* 362 F.Supp. at 639.

The cases cited above are by no means an exhaustive listing of the cases which have acknowledged and applied the constructive use doctrine over the last decade and a half. There are no cases to the contrary. There is no conflict between any Circuit or District Courts.

Moreover, the constructive use doctrine works. It serves the obviously protective objects of the 4(f) statutes. It is not a rigid doctrine which has unnecessarily hampered highway development. But where, as here, Plaintiffs have proved that (1) the park is a publicly owned park of local importance and (2) the adverse effect of the highway on the park will be substantial, then there is no policy or practical reason why the park should not receive the protection of the 4(f) statutes. If Petitioner's interpretation were to be accepted, the full protection of the 4(f)

statutes would be applied to a park if a proposed highway would encroach some fraction of an inch into the park while it would not be applied if the highway and park boundaries were to be coterminous, as is the case here. Except for the absence of the actual taking of a small amount of land, the noise, visual impact, air pollution and other impacts of the freeway on the park would be identical. Obtaining two radically different results where the injury is almost identical is contrary to the remedial and protective purposes of the 4(f) statutes. For this reason every court that has addressed the question has recognized the reality that the actual taking of park land is only one component of what constitutes a use of park land.

Normally, Certiorari is granted only in cases where there is a real and embarrassing conflict of opinion and authority between Courts of Appeals. *NLRB v. Pittsburgh S.S. Co.,* 340 U.S. 498 (1951). *See also General Talking Pictures Corp. v. Western Electric Co.,* 304 U.S. 175 (1938), *adhered to,* 305 U.S. 124 (1938), *reh. den.* 305 U.S. 675 (1939). In the case of the constructive use doctrine there is not only no real or embarrassing conflict of authority between Circuit Courts, there is *NO* conflict at all!

III. The 4(f) Statutes Are Completely Dissimilar in Intent and Operation from the National Environmental Policy Act.

In an apparent effort to jump on the bandwagon of what Petitioner misperceives to be a trend against strict enforcement of environmental statutes, the Petitioner complains that the Ninth Circuit Court's decision subjects ". . . a Federally-funded undertaking to the type of excessive and unfounded requirements that this court has re-

peatedly disavowed."[12] Petitioner then states: "Only two terms ago, this Court stressed the limited judicial role in assessing administrative agency compliance with environmental statutes, concluding that the role was of necessity a limited one in deference to the expertise of administrative agencies. . ."[13]

NOT ONE of the five cases cited by Petitioner in support of these contentions has anything to do with the 4(f) statutes. They are all NEPA cases dealing with environmental impact statements. Neither the law nor the facts relevant to those cases has even a remote connection to the 4(f) statutes or to the questions presented by the Petitioner. In *Weinberger v. Catholic Action of Hawaii,* 454 U.S. 139 (1981) this Court rejected a Court-created requirement that a "hypothetical" EIS be prepared for nuclear storage facilities. In *Strycker's Bay Neighborhood Council Inc. v. Karlen,* 444 U.S. 223 (1980), this Court reaffirmed that the purpose of an EIS is to provide the public and the decisionmaker with accurate information on the environmental consequences of a proposed action but not to require that environmental concerns be elevated over other considerations by the decisionmaker. By contrast, the 4(f) statutes require that protecting parks from use by highways *must* be elevated over other considerations. *Strycker's Bay* re-

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[12] Citing *Weinberger v. Catholic Action of Hawaii,* 454 U.S. 139 (1981), *Stryker's Bay Neighborhood Council v. Karlen,* 444 U.S. 223 (1980), *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519 (1978).

[13] Citing *Baltimore Gas and Electric Co. v. NRDC,* — U.S. —, 103 S.Ct. 2246 (1983), *Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766 (1983).

affirmed *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519 (1978), NEPA's ". . . mandate to the agencies is essentially procedural." *Id.,* 435 U.S. at 558. In *Baltimore Gas and Electric Co. v. NRDC,* — U.S. —, 103 S. Ct. 2246 (1983), this Court held that in NEPA cases the Court's role is limited to ensuring that the agency adequately considered and disclosed the environmental impacts of its actions. Finally, in *Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766 (1983), this Court rejected the lower Court's imposition of a requirement that an EIS examine the psychological effects on the population of the start up of the Three Mile Island nuclear reactor. These are all good, solid NEPA cases. Unfortunately for Petitioner, NEPA has nothing to do with the case at hand.

Unlike NEPA the 4(f) statutes are not "essentially procedural." On the contrary, "These [4(f)] statutes *prohibit* the Secretary of Transportation from authorizing the use of Federal funds to finance the construction of highways through public parks if a 'feasible and prudent' alternative route exists." *Overton Park,* 401 U.S. at 405 (emphasis added, footnote omitted). The language of the statute is unambiguous: ". . . the Secretary *'SHALL NOT APPROVE* any . . . project' that requires the use of any public parkland, 'unless (1) there is no feasible and prudent alternative to the use of such land. . . .'" *Overton Park,* 401 U.S. at 411 (emphasis added). The language of the 4(f) statutes ". . . *is a plain and explicit bar* to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted." *Id.* (emphasis added). The preparation of a 4(f) statement, unlike an EIS, is not a statutory requirement. It is device created by regulations of

the U.S. Department of Transportation to assist the Secretary in determining whether alternatives which would avoid park use are feasible and prudent. However, the preparation of a 4(f) statement is not simply an exercise in gathering accurate information to be used in making a discretionary choice. Rather, the information once gathered must demonstrate, to a fairly high degree of certainty, that there really is no choice except to actually or constructively use park lands for a highway. If all a 4(f) statement does is rationalize the highway authority's preferred choice, then the 4(f) statement is inadequate and the choice cannot be sustained. Unlike NEPA where the object is to gather information to assist the decisionmaker in exercising his discretion, the 4(f) statutes allow almost no discretion. "In other words, a road must not take parkland, unless a prudent person, concerned with the quality of the human environment, is convinced that there is no way to avoid doing so. *Monroe County Conservation Council, Inc. v. Volpe,* 472 F.2d 693, 700 (2nd Cir. 1972) (footnote omitted). The Fifth Circuit Court of Appeals put it even more succinctly, ". . . if there is another way, take it." *Louisiana Environmental Society Inc. v. Coleman,* 537 F.2d 79, 84 (5th Cir. 1976).

Because of the vast dissimilarity between NEPA and the 4(f) statutes, Petitioner's citation to authority interpreting NEPA is simply irrelevant. Petitioner is trying to jump on a bandwagon going in the wrong direction.

IV. The Petitioner May Not for the First Time in the Petition Ask This Court to Resolve Factually Disputed Issues Not Appealed to the Circuit Court.

On July 3, 1978 Respondents amended their complaint to add a new supplemental claim asserting that the 4(f)

statutes applied to Ho'omaluhia Park. On July 11, 1978 the State filed a "Motion to Dismiss or in the Alternative for Partial Summary Judgment" as to that claim. In its motion the State took the position that the 4(f) statutes did not apply to Ho'omaluhia Park because of the contemporaneous planning for H-3 and the Park. That motion was denied by an Order filed on Nov. 21, 1978 by the District Court in which the Court held:

> Although the proposed route of H-3 will not pass through the Ho'omaluhia Recreational Project, the highway's proximity to the recreational project is sufficient to make the 'constructive use' doctrine of *Brooks v. Volpe,* 460 F.2d 1193 (9th Cir. 1972) applicable here. Thus it is my opinion that the constructive use of Ho'omaluhia Project by H-3 triggers the 4(f) requirement in this instance.

No Federal Rules of Civil Procedure Rule 54(b) certification was sought, and no appeal was taken from that order. In reaching its decision the District Court necessarily found that the impact of the highway on the park would be so immediate, direct and substantial that such impact constituted a constructive use of Ho'omaluhia Park. The District Court was well aware that "[t]he degree or existence of constructive use depends both upon the nature of the park and the degree of impacts from the highway." *Stop H-3 Ass'n v. Lewis,* 538 F.Supp. 149, 177 (1982). Prior to trial in 1982, the State filed a "Motion to Reconsider" asking the District Court to reconsider its 1978 Order. In its opinion filed on April 8, 1982 the Court reiterated its earlier ruling and denied the motion:

> Defendants contend that since the park boundaries were determined after the freeway alignment was established, the protections of 4(f) should not apply.
>
> • • •
>
> While Defendants' arguments are intuitively appealing, their position is contrary to the explicit statutory mandate that the Secretary may not approve *any* program or project which requires the use of parkland unless the provisions of the 4(f) statutes are complied with.
>
> *Stop H-3 Ass'n v. Lewis,* 538 F.Supp. 149, 176 (D. Haw. 1982)

Stop H-3 Ass'n appealed the 1982 District Court decision on very narrow grounds, none of which dealt with the District Court's 1978 Order or with the District Courts' denial of the State's Motion to Reconsider. The Ninth Circuit Court of Appeals pointedly noted that the State took no appeal on the 1978 Order.[14] Having failed to appeal the District Court's factual determination that the effects of the highway on the Park would be so substantial that they constituted a constructive use of Ho'omaluhia Park, Petitioners cannot do so now for the first time. Although this Court has in exceptional circumstances, especially in criminal cases, considered issues of law not passed upon by the Court of Appeals.[15] none of those special circumstances are present here and the issue turns on unappealed factual determinations.

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[14] *Stop H-3 Ass'n v. Dole,* 740 F.2d 1442, 1447-1448 n.5 (9th Cir. 1984).

[15] See, *Kiefer-Stewart Co. v. Seagram & Sons,* 340 U.S. 211, 214 (1951); *U.S. v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 239 (1940); *U.S. v. Atkinson,* 297 U.S. 157 (1936).

V. It Is Clear That the Ninth Circuit Court Judges Did Not Substitute Their Judgment for That of the Secretary of Transportation.

Petitioner erroneously contends that the Ninth Circuit Court Judges substituted their judgment for that of the Secretary. The proper role for an appellate Court in 4(f) cases was clearly stated by this Court in *Overton Park*. In that decision this Court made it clear that the 4(f) statutes are " . . . clear and specific directives." *Overton Park,* 401 U.S. at 411. "This language is a plain and explicit bar to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted." *Id.* Feasibility depends only on determining whether an alternative can be built as a matter of sound engineering, and prudence is not to be determined by the Secretary engaging in a wide ranging balancing of competing interests. *Id.* The Secretary may *NOT* " . . . weigh the detriment resulting from the destruction of parkland against the cost of other routes, safety considerations, and other factors, and determine on the basis of the importance that he attaches to these other factors whether, on balance, alternative feasible routes would be 'prudent' . . . " *Id.* Although these factors are not to be ignored it is obvious that it always will be cheaper, less disruptive and possibly safer (because the route would be more direct) to use parkland for a highway. If considerations of cost, social disruption and safety considerations were controlling, there would be no need for the 4(f) statutes in the first place. *Overton Park,* 401 U.S. at 411-412. " . . . the very existence of the statutes indicates that protection of parklands was to be given paramount importance." *Overton Park,* 401 U.S. at 412-413 (footnote omitted). If the Secretary were permitted to

decide on a subjective basis what level of cost or amount of social disruption rendered an alternative imprudent then the application of the 4(f) statutes would essentially be in the unfettered discretion of the Secretary. It was precisely to make clear the limited range of discretion available to the Secretary that this Court stated that before considerations of cost or social disruption render an alternative route which would avoid park use imprudent those factors must reach extraordinary magnitudes, and in order for safety to render an alternative imprudent, the alternative route must present unique safety problems. *Overton Park,* 401 U.S. at 413. This leaves only a very small range of choices that the Secretary can make. *Overton Park,* 401 U.S. at 416.

With this guidance as to the proper interpretation of the 4(f) statutes, there were two questions the Ninth Circuit Court had to consider in this case. First, did the Secretary act within the scope of his authority. In order to answer that question the Ninth Circuit Court had to determine if, *on the record,* the Secretary's decision could reasonably be said to have been within the small range of choices which Congress specified and whether the Secretary could have reasonably believed, *on the record before him,* that all of the alternatives which would avoid the use of Ho'omaluhia Park were imprudent. *Overton Park,* 401 U.S. at 416. Once past these considerations the Administrative Procedure Act, 5 U.S.C. § 706(2) (A) (1964 ed., Supp.V) required that the decision actually made by the Secretary not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . ." *Overton Park,* 401 U.S. at 414. The second question the Ninth Circuit Court was required to consider was whether the

Secretary's decision was based on a consideration of the relevant facts and whether there was a clear error of judgment. *Overton Park,* 401 U.S. at 416. In that regard, " . . . the generally applicable standards of [the Administrative Procedure Act] *require* the reviewing court to engage in a substantial inquiry [and although] the Secretary's decision is entitled to a presumption of regularity . . . that presumption is not to shield his action from a thorough probing in-depth review." *Overton Park,* 401 U.S. at 415 (emphasis added).

In reaching its decision, the Ninth Circuit Court went straight to *Overton Park* for guidance, and in its opinion the Court set out the standard of review in strict conformity with the *Overton Park* decision. *Stop H-3 v. Dole,* 740 F.2d 1442, 1449 (9th Cir. 1984). The Ninth Circuit Court examined the full administrative record, to determine whether the record showed a sufficient basis for the Secretary's decision that every alternative which would avoid the use of Ho'omaluhia Park was imprudent. In conducting its review the Court gave the Secretary's decision the required presumption of regularity but recognized that the Secretary's decision had to be justified on the grounds invoked by the Secretary. *Stop H-3 Ass'n v. Dole,* 740 F.2d at 1450, citing *Securities & Exchange Commission v. Chenery Corp.,* 332 U.S. 194, 196 (1947). The grounds invoked by the Secretary as the basis for finding the "Makai Realignment" and "No Build" alternatives to be imprudent were then exhaustively compared against the record. In short, the Ninth Circuit Court engaged in " . . . a thorough, probing, and in-depth review of the administrative record. . ." *Stop H-3 Ass'n v. Dole,* 740 F.2d at 1449-1458 and concluded that THE PRESENT RECORD

did not support the Secretary's determination that both of the alternatives which would avoid all use of Ho'omaluhia Park were imprudent. *Stop H-3 Ass'n v. Dole,* 740 F.2d at 1458.

At no point in the process did the Court substitute its judgment for that of the Secretary.

———o———

CONCLUSION

Petitioner would have this Court reject the doctrine of constructive use and its application to the facts of this case. For fifteen years that doctrine has been well understood, accepted and beneficially applied by the courts. None of the Circuit Courts are in conflict with respect to the constructive use doctrine. This Court would be required to delve into a unique and complex factual and procedural history which necessarily would limit the applicability of the Court's decision to a narrow range of factual situations. Petitioner has cited to no authority which supports his contentions, because there is none. Nor can the Petitioner overcome his failure to appeal any part of the District Court's decision. Finally one need only to read the Ninth Circuit Court's scholarly and careful opinion to realize that the Court did precisely what it was required to do by *Overton Park.* The Ninth Circuit Court applied the correct standard of review, examined the whole record and found that the reasons advanced by the Secretary to support his finding of imprudence were not "unique problems", "truly unusual factors" nor did those problems

discussed in those reasons reach "extraordinary magnitudes" as required by *Overton Park*. The Court properly and correctly reached the right result. There being no error, the Petition should be denied.

Respectfully submitted,

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On October 16, 1984, Respondents declined the request of Pacific Legal Foundation to consent to its filing brief of an *amicus curiae* on *inter alia*, the following grounds: the parties to this action have been litigating this case for twelve years, and counsel for the State Petitioner are quite capable of adequately representing the Petitioner's position. In its Brief Amicus Curiae, Pacific Legal Foundation has presented new issues outside of the scope of the questions set forth by Petitioner in his Petition. Respondents believe the Pacific Legal Foundation's presence would obscure the issues rather than clarify them for the Court and oppose its motion to participate as *amicus curiae*.

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No. 84-1278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WAYNE J. YAMASAKI,
DIRECTOR, HAWAII DEPARTMENT OF TRANSPORTATION,
Petitioner,

v.

STOP H-3 ASSOCIATION, a Hawaii non-profit corporation, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. FACTUAL CLARIFICATIONS.

As respondents[1] correctly note, they have prevented the highway which is the subject of this petition from

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[1] Federal respondents in their Memorandum In Opposition do not defend the validity of the Court of Appeals' decision. Indeed, they concede that the Court of Appeals "may well have exceeded

being built for 13 years. (Br. Op. p. 9) The balance of their Statement of the Case, however, is filled with inaccuracies, some of the more important of which compel correction:

> H-3 is not a spur line off of H-1, but would connect two major trip-generating areas, and would be the only trans-Koolau route designed and built to Interstate freeway standards.
>
> In the Department of Defense's April 1982 *Interstate Completion Study,* as opposed to the outdated 1981 study respondents cite, H-3 is classified as "Defense important . . . serving defense installations . . . traversing topographic barriers."
>
> There is a short windward segment of H-3 which can be linked to Kamehameha Highway. Petitioner moved twice in the District Court, once in 1974 and once in 1976, to permit this connection. Respondents opposed the linking up each time. No such understanding as that alluded to by respondents (Br. Op., pp. 5-6) appears on the record.
>
> The flood control project which was to become Ho'omaluhia Park came nowhere near H-3 in its

---

the permissible scope of judicial review". (Memo. Opp., at 2), and "believe there is a substantial basis for petitioner's contention (Pet. 14-18) that the Court of Appeals has blurred the line separating proper judicial review from interference with administrative discretion and informed decision making." (Memo. Opp., at 3) This is not surprising, as Federal respondents defended the Secretary of Transportation's action in the District Court and urged in the Court of Appeals that the District Court's judgment be affirmed. As to the utility of resupplementing the administrative record, see Part III, p. 5 below. Because Federal respondents agree with Petitioner as to the overreaching nature of the Court of Appeals' judgment, the remainder of this Reply Brief will discusss the arguments advanced by respondents to uphold that judgment.

original form. Only after H-3's alignment was finalized did the flood control project evolve into a park. Only then did the park expand its boundaries twice to meet H-3, swallowing up in the process the buffer strip between H-3 and the park. The jurisdiction controlling the park, the City and County of Honolulu, chose to forego the buffer strip to prevent any development between the park and H-3. The park was not opened until 1982.

II. THE SECRETARY CORRECTLY CONSIDERED THE HISTORY BEHIND H-3 AND THE PARK IN DETERMINING THAT NO FEASIBLE AND PRUDENT ALTERNATIVE EXISTED TO BUILDING H-3 AROUND, BUT NOT THROUGH, THE PARK.

The Secretary considered the history of joint coordination and planning for H-3 and Ho'omaluhia Park in making the Section 4(f) determination. As the District Court noted "the park design took into account the potential impacts of the freeway . . . landscaping and other measures are designed to visually shield the park from the highway." (Pet. App. 107a)

In the case of *A.C.O.R.N.* v. *Brinegar,* 398 F. Supp. 685 (E.D. Ark. 1975), *aff'd, A.C.O.R.N.* v. *Coleman,* 531 F.2d 864 (8th Cir. 1976), two parks were at issue, one of which expanded to meet a proposed highway in the same manner as did Ho'omaluhia Park:

> Moreover, the defendants did not locate the route of the project along the north border of Kanis Park; the park was located by the City after the route of the freeway had been determined and with full knowledge and expectation that the freeway would be built along the line now contemplated. Thus, it may fairly be said that the City

> is making a constructive use of the freeway to improve access to the park rather than that the defendants are about to make a constructive use of the park.

Ibid., 398 F. Supp. at 693.

Similarly, the Eighth Circuit, in *Citizens to Preserve Wilderness Park* v. *Adams*, 543 F. Supp. 21 (D. Neb. 1981), *aff'd*, 685 F.2d 438 (8th Cir. 1982), was correct in concluding that administrative decision-makers need not disregard common sense and wisdom in making Section 4(f) determinations:

> If that were so, the taking of seventeen houses and thirty houses or the severing of a school district or the impinging on a mental hospital or any other factor or collection of factors would have a fixed weight, the same whether a highway would cut a park in two or brush its edge, or swallow up the heartland of Central Park in New York or Brackenridge Park in San Antonio or Overton Park in Memphis . . . neither the Act of Congress, nor the legislative history, nor the Supreme Court of the United States in *Overton Park, supra,* says that in deciding whether an alternative route is prudent it matters not a whit whether the alternative is an alternative to the taking of a square inch or a square mile. Neither does any say that all parkland must be pretended to have the same quality. In the greater scheme of things it cannot be so, not in exercising "discretionary" authority with "wisdom and reason." [Footnotes omitted.]

Ibid., 543 F. Supp. at 27-28.

III. THE COURT SHOULD NOT CONDONE THE MISCHIEVOUS CONSEQUENCES OF THE COURT OF APPEALS' DECISION, FOR IF THE DECISION IS UPHELD, IT WILL DOOM FUTURE JOINT PARK AND HIGHWAY PLANNING EFFORTS.

It is no answer to the problems raised by the Court of Appeals' decision to suggest that the administrative record here can be resupplemented (Memo Op., at 3-4). Nor can those problems be dismissed by suggesting that the facts of this case have never appeared before and will never appear again (Br. Op. at 11-13).

For while the record concededly does not reveal any other highway being enjoined in the past because of its co-location with a park, if the Court of Appeals' decision stands, that situation will most assuredly never arise again. Be it a highway or mass transit system (*Philadelphia Council of Neighborhood Organizations* v. *Coleman,* 437 F. Supp. 1347 (E.D. Pa. 1977), *aff'd,* 578 F.2d 1375 (3rd Cir. 1978)) or airport (*Sierra Club* v. *Department of Transportation,* 753 F.2d 120 (D.C. Cir. 1985)), the spectre of Section 4(f) litigation will render it difficult for the proponents of a transportation project to countenance any joint development of a park or wildlife refuge, or designation of an historic site. With no such joint planning and development, this situation will certainly not arise again. Resupplementation of the record would be pointless, as the Court of Appeals did not indicate that the Secretary's recognition of the joint development of H-3 and the park was unsupported by the record. Resupplementation would serve no productive purpose.

This Court should find that the Court of Appeals erred in ignoring joint development of a transporta-

tion facility and a park where Congress provided in Section 4(f):

> [S]pecial effort should be made to preserve the natural beauty of the countryside. . . . The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands traversed.

IV. CONCLUSION.

For the reasons stated herein, the petition for certiorari, and the brief *amicus curiae* of Committee for H-3 and Pacific Legal Foundation, a writ of certiorari should be granted.

Respectfully submitted,

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